

The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong[†]

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Introduction

This article explores the ways in which the International Convention on the Elimination of All Forms of Discrimination (“CEDAW”)¹ has been implemented in the United Kingdom (“UK”) and the Hong Kong Special Administrative Region of China (“Hong Kong”). We have selected these two jurisdictions in part because there are many common features in their legal systems and in their approaches to sex discrimination. As a British colony, Hong Kong inherited English common law, and the Hong Kong legal system

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1. G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981). Strictly speaking, the abbreviation CEDAW only refers to the Committee on the Elimination of Discrimination Against Women (the enforcement body for the Convention, which is discussed later in this article). However, it has become common to refer to the Convention itself as CEDAW and to refer to the Committee as the “CEDAW Committee,” and this is the terminology that we have adopted in this article.

continues to reflect a strong British influence (despite the resumption of Chinese sovereignty in 1997). The international human rights treaties that were ratified by the UK on behalf of Hong Kong also continue to apply there. Moreover, both the UK and Hong Kong have experienced increased public awareness of international human rights standards in the past decade. In the UK, this has been brought about by its greater integration with Europe and the enactment of the Human Rights Act 1998,² which incorporated the European Convention on Human Rights and Fundamental Freedoms³ into domestic law. In Hong Kong, public awareness arose during the transition period leading to its return to China. During this time, the Hong Kong Bill of Rights Ordinance⁴ was enacted, which thereby incorporated the International Covenant on Civil and Political Rights (the "ICCPR") into Hong Kong domestic law.

However, there are also important cultural and political differences between the two jurisdictions. Unlike the UK, Hong Kong has never enjoyed a democratic system of government, either as a British colony or as a Special Administrative Region of China. In addition, legal recognition of women's right to equality has come rather late to Hong Kong. Hong Kong's Sex Discrimination Ordinance⁵ is largely based upon the British Sex Discrimination Act 1975, but it was not enacted in Hong Kong until 1995. CEDAW was not applied to Hong Kong until 1996, a full decade after the UK's ratification. Although the Hong Kong government has often attributed this slow development of women's equality to cultural factors, the lack of democracy also played an important role. Ironically, despite the late arrival of CEDAW, our research indicates that it is having a more practical impact in Hong Kong than in the UK, largely because Hong Kong women's organisations are making more use of CEDAW in their current lobbying efforts.

Part I of this article provides an introduction to CEDAW and its enforcement mechanisms. Parts II and III analyse the implementation of CEDAW in the two jurisdictions, including the extent to which CEDAW is considered in public policy making, the extent to which the judiciary has relied upon CEDAW in deciding

2. Human Rights Act, 1998, c. 42 (Eng.).

3. European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Feb. 3, 1953).

4. Hong Kong Bill of Rights Ordinance, 1991, c. 383 (H.K.).

5. Sex Discrimination Ordinance, 1995, c. 480 (H.K.).

cases, and the participation of non-governmental organisations (“NGOs”) in the reporting process. NGO participation is assessed in the context of the development of the women’s movement in the two jurisdictions, relying upon shadow reports and other documents produced by NGOs, interviews with NGO representatives, and the authors’ experiences working with NGOs in Hong Kong. Part IV concludes with our analysis of the similarities and differences in the two jurisdictions and the opportunities for better implementation of CEDAW.

I. CEDAW and its Enforcement Process

CEDAW was adopted by the General Assembly in 1979 and went into force in 1981. It is one of the United Nations’ six core human rights treaties and the major treaty governing women’s status. CEDAW was largely the result of lobbying by women, who argued that existing human rights instruments failed adequately to address women’s rights. As a product of the 1970s, it largely embraces the “sameness” theory of equality, seeking equal opportunities for women and legal equality with men. However, CEDAW is also concerned with equality of result and it does, therefore, permit positive discrimination in favour of women.⁶ CEDAW is also noteworthy for addressing discrimination in private spheres, including cultural practices and the family.⁷ In particular, Article 2 expressly obligates States Parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.”

CEDAW established a Committee on the Elimination of Discrimination Against Women⁸ (“CEDAW Committee”), which monitors compliance with the treaty. The CEDAW Committee consists of twenty-three experts elected by the States Parties, who serve in their personal capacities. The primary function of the CEDAW Committee is to receive and consider the reports of States Parties submitted under Article 18. CEDAW has been widely ratified and now has more States Parties than any other human rights

6. CEDAW art. 4.

7. Compare the definition of discrimination in Art. 1(1) of the Convention on the Elimination of All Forms of Racial Discrimination (which refers to discrimination in “the political, economic, social, cultural, or any other field of public life”) with that in Art. 1 of CEDAW (which refers instead to discrimination in “the political, economic, social, cultural, civil or any other field”).

8. CEDAW art. 17.

treaty other than the Convention on the Rights of the Child. However, CEDAW also has an unprecedented number of wide-ranging reservations, some of which undermine the central tenets of the treaty.⁹ Other criticisms that have been made of the treaty include the emphasis on equality with men, the lack of provisions on violence against women, and the absence of a full right to property.¹⁰ However, the CEDAW Committee has made an effort to address some of these issues through its general recommendations.¹¹

Women also frequently complain that CEDAW is not adequately enforced. Article 18 requires States Parties to submit an initial report within one year of ratification and to report every four years thereafter on the implementation of the treaty in their respective jurisdictions. The reports should describe the "legislative, judicial, administrative or other measures" that have been adopted to give effect to the Convention.¹² A weakness in the reporting process is that certain States Parties fail to submit their reports on time, a violation for which there is no real sanction. However, this has not generally been a problem for the UK and Hong Kong governments, as they both take the reporting deadlines and other formal requirements of international human rights treaties quite seriously. Another problem is that there has been a backlog of reports, and some reports have not been reviewed in a timely manner. The CEDAW Committee is attempting to address this and held an extra session, in August 2002, to reduce the backlog of reports.¹³

9. The CEDAW Committee has objected to the practice of entering extensive reservations, including those based upon traditional, religious, or cultural practices that are incompatible with CEDAW. See CEDAW COMMITTEE, "RESERVATIONS TO CEDAW," available at <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> (last visited Jan. 29, 2003).

10. See Fiona Beveridge & Siobhan Mullally, *International Human Rights and Body Politics*, in *LAW AND BODY POLITICS: REGULATING THE FEMALE BODY* 240-273 (Aldershot: Dartmouth 1995); Andrew Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of All Forms of Discrimination Against Women*, 14 *YALE J. INT'L L.* 6 (1989).

11. See CEDAW art. 21 (empowering the CEDAW Committee to make suggestions and general recommendations). For examples of general recommendations that address some of the "gaps" in CEDAW, see General Recommendations No. 12 (8th session, 1989) and 19 (11th session, 1992) on violence against women; General Recommendation No. 13 (8th session, 1989) on equal pay for work of equal value; and General Recommendation No. 14 (9th session, 1990) on female circumcision.

12. CEDAW art. 18.

13. At its twenty-fifth session the CEDAW Committee adopted Decision 25/1, which noted that there were a significant number of reports of States Parties awaiting consideration and requested the General Assembly to approve, on an exceptional

Although the lack of real sanctions makes it a fairly soft enforcement process, the duty to submit reports is still the most important mechanism for enforcing international human rights treaties.¹⁴ To a large extent, compliance depends upon the extent to which a government wishes to be viewed as an active participant in the United Nations human rights treaties and to receive good marks from the CEDAW Committee. As Sally Merry, who has studied CEDAW in the context of violence against women, has observed:

The central regulatory feature of the Convention and its hearings is the definition and naming of problems and the articulation of solutions within a prestigious global forum. National and international NGOs as well as other international actors endeavour to shame non-compliant governments. This is not a system of sanctions, but a cultural system whose coin is admission into the international community of human-rights-compliant states.¹⁵

When drafting its report, a State Party is expected to assess its own performance and the problems within its jurisdiction. Moreover, if done with appropriate publicity and input from the public, the process of drafting the report should raise awareness of the treaty and improve dialogue between the government and interested NGOs.¹⁶ The CEDAW Committee has been particularly receptive to the involvement of NGOs, and has encouraged governments to involve them in the drafting of government reports. In this regard, CEDAW has benefited from the work of the International Women's Rights Action Watch ("IWRAP"), an international women's organisation focusing on the work of the CEDAW Committee. IWRAP monitors compliance with CEDAW, supplies information, and supports NGOs who are preparing shadow reports.¹⁷

basis, a special three-week session in August 2002 to be devoted entirely to reducing the backlog of reports. See the announcement of the "CEDAW Exceptional Session" at the website of the Division for the Advancement of Women, *available at* http://www.un.org/womenwatch/daw/cedaw/ex_sess.htm (last visited Jan. 29, 2003).

14. MICHAEL O' FLAHERTY, *HUMAN RIGHTS AND THE UN: PRACTICE BEFORE THE TREATY BODIES* 1-3 (1996).

15. Sally Engle Merry, *A New Global Legality? Unpacking the CEDAW Process* 10 (Mar. 2001) (unpublished manuscript presented at the Wenner-Gren conference, Violence Between Inmates, Globalization, and the State) (copy on file with authors).

16. CEDAW has produced guidelines for the preparation of reports. See *Guidelines for the Preparation of Reports by States*, CEDAW/C/7/Rev.3.

17. See Jane Connors, *NGOs and the Human Rights of Women at the UN*, in *THE CONSCIENCE OF THE WORLD: THE INFLUENCE OF NON GOVERNMENT ORGANISATIONS IN THE UN SYSTEM* 147-181 (Peter Willetts ed., 1996).

Participating in the reporting process can empower those involved and provide opportunities for collaboration and coalition building among NGOs, as well as with relevant government departments.¹⁸ NGOs may also produce their own "shadow reports." This is important because governments tend to provide an overly positive assessment of women's conditions. NGO reports can challenge that assessment and provide alternative statistics or analyses. O'Flaherty¹⁹ notes that if NGOs are heavily involved in the drafting of the government report, then it may be regarded as a joint effort, which could prevent NGOs from adopting an independent stance from the government. It is best if NGOs can produce one or more of their own reports, even if they are consulted during the drafting of the government report.²⁰

NGO attention can make the public more aware of the government report and convince the media of the newsworthiness of the entire reporting process. NGOs can also monitor the extent to which a government honours any promises made to the CEDAW Committee. An example of the crucial role played by such organisations is documented by UNIFEM in *Bringing Equality Home*, where it describes the government of Zimbabwe as producing a glowing report to the CEDAW Committee with the centrepiece being the Legal Age of Majority Act 1982.²¹ Shortly after presenting the report, there were moves for the legislation to be repealed. However, NGOs who had been active during the reporting process campaigned to defend the legislation and to ensure that the government was held accountable for the promises made to the CEDAW Committee.²²

18. See Afra Afsharipour, *Empowering Ourselves: The Role of Women's NGOs in the Enforcement of the Women's Convention*, 59 COLUM. L. REV. 129 (1999), which includes a case-study of how NGO participation helped to pressure the government of Bangladesh to take its obligations under CEDAW more seriously.

19. O'FLAHERTY, *supra* note 14, at 6.

20. There is a useful summary of the procedure for producing a shadow report in *Producing NGO Shadow Reports to CEDAW: A Procedural Guide* (IWRAW 1996), available at <http://iwwraw.igc.org/ngo/guide> (last visited Jan. 29, 2003).

21. UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (UNIFEM), *BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* § V (Ilana Landsberg-Lewis ed., 1998), available at <http://www.unifem.undp.org/cedaw/> (last visited Jan. 29, 2003).

22. Unfortunately the impact of the legislation was severely restricted by the Supreme Court in the *Magaya* Case. See The International Women's Rights Action Watch (IWRAW), *Two Steps Back: Customary Law and the Zimbabwe Constitution*, 13 THE WOMEN'S WATCH No. 1 (Sept. 1999), available at

The CEDAW Committee will allocate a country rapporteur who is responsible for reading the government report and background information supplied by the government and NGOs. Before the formal hearing of the report, a four-person pre-session group prepares questions, which are then conveyed to the relevant government to be answered during the opening session.²³ NGOs are also invited to orally present information to the pre-session working group, and since January 1999 they may make oral statements on reports at the public meetings of the Committee.²⁴ The aim is to have a constructive dialogue between Committee members and representatives of the government, enabling the State Party to further evaluate its position. Unfortunately, in practice, many government representatives view their role in the hearing as primarily to defend their government's position (and are probably directed by their governments to assume that role).

After the hearing, the country rapporteur will usually be assigned to write the Concluding Comments of the Committee.²⁵ Of course, the CEDAW Committee cannot compel the State Party to implement these suggestions, but they do provide an important lobbying tool for NGOs. IWRAW maintains that the Concluding Comments are "the crucial product for NGO action" as they constitute "a public statement given to the government that specifies further action required to live up to its obligations under the Convention."²⁶ The Concluding Comments also provide an authoritative interpretation of the obligations under the treaty.

The recent adoption of the Optional Protocol to CEDAW is one of the most important reforms designed to enhance enforcement of the treaty.²⁷ Activists and NGOs lobbied for the Optional Protocol at the Vienna Convention on Human Rights and the Fourth World

<http://www.igc.org/iwraw/publications/ww/9909.html> (last visited Jan. 29, 2003) [hereinafter IWRAW].

23. The procedure for Initial Reports is different than that of periodic reports as questions are not drafted in advance and the time allocated to such sessions is shorter.

24. Mara R. Bustelo, *Committee on the Elimination of Discrimination Against Women at the Crossroads*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 79-111 (Phillip Alston & James Crawford eds., 2000).

25. IWRAW, *supra* note 20, at 5.

26. *Id.*

27. See Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?*, 21 *BROOK. J. INT'L L.* 679 (1996).

Conference on Women, which was held in Beijing in 1995.²⁸ A Working Group of the Commission on the Status of Women took four years to negotiate the language. The Optional Protocol was adopted by the General Assembly on October 6, 1999 and opened for signature on Human Rights Day.²⁹ The Optional Protocol provides two important mechanisms. First, a communications procedure allows individuals or groups of individuals who claim to be victims to assert that there has been a violation of any of the rights in CEDAW, provided that they have first exhausted local remedies.³⁰ Second, an inquiry procedure allows the Committee itself to investigate "grave or systematic" violations of the rights in the treaty by a State Party.³¹

Although some NGOs had argued for wider rules of standing to allow anyone with a sufficient interest to bring a complaint and for more open procedures,³² the Optional Protocol was generally welcomed by women's organisations. It is consistent with the practice of other major human rights conventions and is part of a more general strategy to mainstream women's human rights throughout the United Nations. The interpretations of the treaty adopted by the CEDAW Committee when deciding complaints are likely to be relied upon by other human rights bodies when considering women's issues within their own remit. They may also be referred to by courts if they look to CEDAW for guidance in interpreting domestic laws.

Thus far there are seventy-four signatories to the Optional Protocol and thirty-nine States Parties.³³ Interestingly, all of the UK's European Union partners have either signed or ratified the Protocol. However, the UK government has stated that it has no intention of

28. The Beijing Platform for Action 230(K) states that governments should: "Support the process initiated by the Commission on the Status of Women with a view to elaborating a draft optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women that could enter into force as soon as possible on a right of petition procedure"

29. See G.A. Res. 5414, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/4 (1999) [hereinafter *Optional Protocol*].

30. *Optional Protocol* art. 2, *supra* note 29, at 3.

31. *Optional Protocol* art. 8, *supra* note 29, at 5.

32. See, e.g., AMNESTY INTERNATIONAL, *THE OPTIONAL PROTOCOL TO THE WOMEN'S CONVENTION: ENABLING WOMEN TO CLAIM THEIR RIGHTS AT THE INTERNATIONAL LEVEL* (Jan. 12, 1997), at www.amnesty.org (AI Index: IOR 51/04/97) (last visited Feb. 24, 2003).

33. As of May 2002. For a regularly updated list of ratifications, see Division for the Advancement of Women, "Signatures and Ratifications of the Optional Protocol," available at <http://www/un.org/womenwatch/daw/cedaw/sigop.htm> (last visited Feb. 24, 2003).

ratifying the Protocol at the present time.³⁴ In fact, since the UK has not ratified any of the individual complaints petitions under the UN treaty system, this appears to be a general policy that is unlikely to change in the near future.³⁵ It is also unlikely that Hong Kong will ratify the Optional Protocol at any time soon, as it is now a Special Administrative Region of the People's Republic of China. Any decision to ratify the Protocol would have to be approved by the central government. Thus, our assessment of the prospects for enforcing CEDAW in the UK and Hong Kong relies primarily upon the more traditional methods, including the reporting process, lobbying, NGO shadow reports, and judicial use of CEDAW in deciding cases.

II. The Implementation of CEDAW in the United Kingdom

A. Introduction

CEDAW was ratified by the UK in 1986.³⁶ The *travaux préparatoires*³⁷ show that the UK government was actively involved in the drafting process, and proposed alternative drafts to some of the articles. When it ratified CEDAW, the UK government made a large number of reservations. However, many of these reservations have now been withdrawn and the remaining reservations are confined to nationality, immigration, and social security.³⁸ Thus there should now be substantial opportunities for CEDAW to affect domestic law and policy in the UK. Yet interviews with women's organisations reveal that they are not actively participating in the reporting process, and that CEDAW is having little effect on domestic policies. Judges also

34. See the response of Lord Scotland to a Parliamentary question asked by Lord Lester, HANSARD, Mar. 20, 2000, at WA1, and the response of the government to the Parliamentary questions by Lord Lester, HANSARD, May 2, 2000, at WA50.

35. See INTER DEPARTMENTAL REVIEW OF U.K. POSITION ON INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (Paper by the Lord Chancellor's Department) (2002), I.R.I.H.R.I. (02-06) (on file with author).

36. For the background to the UK's ratification of the Convention, see GEORGINA ASHWORTH, *A DIPLOMACY OF THE OPPRESSED: NEW DIRECTIONS IN INTERNATIONAL FEMINISM* (1995).

37. See LARS ADAM REHOF, *GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (1993).

38. There are reservations to Articles 9, 11, 15 and 16. See The Women's Unit, Cabinet Office, *The Fourth Report of the United Kingdom of Great Britain and Northern Ireland to the United Nations on the Convention on the Elimination of All Forms of Discrimination Against Women*, at 22-23 (1999).

have not relied upon CEDAW for guidance when deciding cases. However, as we note below, the Human Rights Act of 1998 and the current discussion of the Optional Protocol to CEDAW appear to have increased NGO interest in international human rights standards. Thus, there is potential for CEDAW to be relied upon more in the near future, both as a lobbying tool and as a reference in strategic litigation.

B. The Reporting Process and the Role of United Kingdom NGOs

Very few UK NGOs have written their own shadow reports to the CEDAW Committee. Thus, this portion of our study relies primarily on interviews with NGOs to ascertain their understanding of CEDAW and the extent to which they have participated indirectly (for example, by contributing their views to government or quasi-governmental bodies). The groups interviewed were primarily women's organisations that are significantly involved in campaigning on issues of importance to the women's movement.³⁹ One of the groups, Charter 88, did not deal directly with women's issues although it did campaign for better political representation of women. Most of the groups interviewed were domestic pressure groups, although certain groups, such as Womankind, Change, and Amnesty International, have a more international focus. The groups varied in age, size, and the resources available to them. The interview covered the work of the pressure group, its use of CEDAW, and the interviewees' views on the reporting process. Interviewees were also asked about the utility of the Optional Protocol, whether they planned to campaign for its ratification by the UK, and what other steps could be taken to better implement CEDAW. Some interviewees were very familiar with CEDAW, while others knew little about it. Those who had more extensive knowledge were questioned about the nature of CEDAW and whether it would be more useful to have a more rights-based convention rather than one based on equality with men.

The UK has submitted four reports to the CEDAW Committee. Its initial report was submitted in 1987 but was not considered by the

39. The groups interviewed were the Fawcett Society, Rights of Women, Amnesty International UK Womankind, Change, Intra African Committee on Harmful Cultural Practices, Wages for Housework, Women's Environmental Network, Charter 88, National Association of Women's Organisations and the National Council of Women. Individuals interviewed were the Director of the Women's National Commission and Valerie Evans, ex-Chair of the Women's National Commission.

CEDAW Committee until 1990. Its second periodic report was submitted in 1991 and considered in 1993. Its third report was published in 1993 and the fourth report was published in January 1999. The third and fourth reports were considered together in June 1999. The fourth periodic report was drafted by the government's Women's Unit. However, the consultation process for the fourth periodic report was organised by the Women's National Commission⁴⁰ ("WNC"). The WNC is not an NGO. Rather, it describes itself as an "official independent advisory body" that provides the UK government with insight into the views of women. The WNC, at the invitation of the government's Women's Unit, consulted all of its members and associates on individual articles or on CEDAW generally. A document was prepared based on this consultation and sent to the CEDAW Committee's rapporteur for the UK, Judge Sylvia Cartwright of New Zealand. The WNC commented on successive drafts of the government report and produced a short commentary to the final report that was presented to the pre-session CEDAW working group. The WNC also commented on the government's answers to the questions posed by the CEDAW expert committee. The Chair of the WNC also attended the UN hearing and met with the Committee.⁴¹

The CEDAW Committee commended the government for its preparation and stated that it appreciated:

[T]he open manner in which the report was prepared and presented and, in particular, the breadth of the consultative process with non-governmental organizations during the preparation of the fourth periodic report. This enriched the reports and enabled a large number of women to become informed about the Convention and the rights protected by it.⁴²

Although the UK NGOs were consulted by the WNC during the drafting process, the report was regarded as belonging to the government and therefore NGOs were not prevented from drafting their own alternative reports. Nonetheless, very few shadow reports

40. See WOMEN'S NATIONAL COMMISSION OF THE UNITED KINGDOM, *Submission to the United Nations' Committee on the Elimination of Discrimination Against Women* (June 1999). For information on the Women's National Commission, see its website at <http://www.thewnc.org.uk> (last visited Mar. 26, 2003).

41. *Id.* at 38.

42. *Report of the Committee on the Elimination of Discrimination Against Women*, 54th Sess., Supp. No. 38, at 289 ¶ 28, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter *CEDAW Report*].

were actually produced. A shadow report was produced by the WNC on the basis of its consultations. NGOs in Northern Ireland also produced separate shadow reports,⁴³ as did the Women's International League for Peace and Freedom.⁴⁴ However, none of the other NGOs interviewed for this study drafted their own shadow report.

It is somewhat surprising that these organisations did not organise a shadow report of their own. Although the WNC plays a valuable role in organising the consultation and producing its report, there is always a danger that a quasi-government organisation like the WNC may not adequately critique the official government position. Indeed, such bodies may become a "mechanism to insulate policies against pressure group activity."⁴⁵ One interviewee was not concerned by this, noting that the WNC was independent of the government and that some of the more "radical groups" had now joined the WNC. However, others expressed the view that "the government sets the agenda" for the WNC, and questioned whether it could be trusted to be independent. For example, one interviewee thought that it would be difficult for the WNC to campaign for ratification of the Optional Protocol in view of the government's position.⁴⁶ Thus, although she commended the WNC for compiling an alternative report, she thought it would be more useful if the NGOs themselves had organised a major shadow report. She also commented that the report was weak in places because the WNC did not consult all of the key women's groups. Some interviewees expressed disappointment that the National Association of Women's

43. See NORTHERN IRELAND WOMEN'S EUROPEAN PLATFORM, SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN: WOMEN'S PARTICIPATION ON NON-GOVERNMENTAL PUBLIC BODIES IN NORTHERN IRELAND IN RELATION TO ARTICLE 7 OF THE CONVENTION (May 1999), available at <http://www.nihrc.org/files/submiss1a.htm> (last visited Feb. 24, 2003); THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE, NORTHERN IRELAND, *Submission to the United Nations Committee on the Elimination of Discrimination Against Women* (May 1999).

44. See WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM (UK), *CEDAW "Shadow Report"* (1999) (on file with author).

45. WYN GRANT, *PRESSURE GROUPS AND BRITISH POLITICS* (2000).

46. In fact, the WNC has lobbied the government in favour of the ratification of the Optional Protocol. See UK WOMEN'S NATIONAL COMMISSION, *WOMEN 2000: REPORT FROM THE UK WOMEN'S NATIONAL COMMISSION ON THE IMPLEMENTATION OF THE BEIJING PLATFORM FOR ACTION IN THE UK* (1999), available at <http://www.thewnc.org.uk> (last visited Feb. 24, 2003) [hereinafter *WOMEN 2000 REPORT*].

Organisations (“NAWO”) had not organised a shadow report, as this organisation was clearly independent of government. When interviewed, however, the Chair of NAWO explained that it lacked the resources of the WNC.

Some interviewees also noted that the lack of alternative reports means that women’s NGOs with specialised knowledge in particular areas, such as violence against women or criminal justice, are not taking the opportunity to convey that knowledge to the CEDAW Committee. Moreover, the process of composing a shadow report can help an NGO to set its own political agenda. One interviewee noted that UK women’s groups could learn from NGOs in other countries in this respect, as a strong NGO shadow report could be a useful lobby tool “well beyond the period of reporting.” Moreover, individual NGO shadow reports can reach particular sectors of the community that have a special interest in the work of that group, thereby increasing public awareness of CEDAW.

Interviewees commented that the failure of women’s groups to co-ordinate one or more shadow reports separately from the WNC was partly the result of the fragmented nature of the women’s movement in the UK. One activist stated, “There are lots of women’s organisations but no cohesion. We don’t tend to come together over common causes. That is a challenge in itself.” This view is consistent with much of the literature, which highlights the diversity of the UK women’s movement, particularly in the past two decades. In 1978, the movement experienced a split over the issue of whether male violence was an inherent aspect of masculinity, and there has been no real attempt to re-establish a single network. The women’s movement has been described as a “dispersed collection of groups, campaigns and political tendencies with no single ideology.”⁴⁷ Moreover, since many of these groups are preoccupied with service provision, they only come together for campaigns on particular issues.⁴⁸ This is not to underestimate the impact of the women’s movement on politics, which often manifests itself through political parties and trade unions.⁴⁹ It simply acknowledges that there is no single umbrella

47. David Boater, *The Feminist Challenge* (1984) (quoted in Joyce Glee, *Movement Strategies: Inside or Outside The System: Feminism in Britain: Politics Without Power?*), in DRUDE DAHLERUP, *THE NEW WOMEN’S MOVEMENT: FEMINISM AND POLITICAL POWER IN EUROPE AND THE USA* 109 (1986).

48. See Hannana Siddiqui, *Black Women’s Activism: Coming of Age*, 64 *FEMINIST REV.* 83 (Spring 2000).

49. For a discussion of the impact of the women’s movement on British politics,

organisation capable of mobilising the diverse interests that are working on women's concerns.

The interviews also indicate that many UK women's organisations lack knowledge about CEDAW and do not understand how it may be useful. This raises the question of whether enough is being done to publicise CEDAW, which is one of the obligations of a State Party. In theory, the UK government carries out this obligation through the WNC. Although the WNC has often been criticised for representing too narrow a range of women, it has recently made a greater effort to be inclusive and has opened its membership to all women's groups. The impact of this can be seen in the WNC's report for the Beijing Plus Five conference in 2000, which reflects an increase in the number and diversity of the groups consulted.⁵⁰ Nonetheless, at least three interviewees argued that they still found it difficult to become involved in the organisation. This is particularly worrying with regard to smaller organisations that do not have staff with knowledge of international treaties and thus rely on the WNC for information and training on CEDAW.

The interviews also indicate that many women's groups in the UK have not developed a "rights based" approach and do not link the issues on which they campaign with the broader concept of human rights. While some of the interviewees argued that they simply lacked the resources and expertise to participate in the CEDAW enforcement process, others expressed doubt about the value of the convention within the domestic sphere. This leads to the next issue, which is the extent to which CEDAW and the Concluding Comments of the CEDAW Committee can be fed into domestic policy debates in the UK.

C. The Impact of CEDAW on Public Policy in the United Kingdom

Many interviewees questioned the ability of CEDAW to have any impact on government policies in the UK, noting that it would only be useful in establishing principles and not fine details. One interviewee commented, "If we want political leverage we would use women's votes. If we mention the Women's Convention, the government is likely to say that its record is so much better than many other countries." Some groups also argued that after eighteen years

see JONI LOVENDUSKI & VICKY RANDALL, *CONTEMPORARY FEMINIST POLITICS: WOMEN AND POWER IN BRITAIN* (1995).

50. WOMEN 2000 REPORT, *supra* note 46.

of Conservative government and since the change of government in June 1997, when New Labour came to power, women's issues were at least on the agenda, and references to CEDAW would not add much to the government's approach. Indeed, McRobbie argues that "the situation of women in contemporary Britain is at the heart of the present government's key concerns."⁵¹ For example, she notes that the government is already concerned with such issues as single parents, welfare to work, the provision of childcare, and teenage pregnancy.

Several interviewees felt that that CEDAW would not be a useful lobbying tool in any event because the political culture in the UK is too insular. One interviewee complained that CEDAW is regarded as being "for foreign consumption only," and that a "British is best" mentality makes politicians reluctant to look at what other societies are doing. Some women commented that UK women's organisations are also "obsessively national" and fail to see the purpose of taking a more international approach.

The observations of these interviewees are understandable in view of the approach taken by the UK government. CEDAW is rarely referred to by the British government within the domestic sphere, and appears to be having almost no impact upon public policy. For example, the government does not refer to CEDAW when introducing legislation or proposing new policies. There is also no Parliamentary Committee that studies the government's periodic reports. From the point of view of the government, the Sex Discrimination Act 1975 and other domestic legislation satisfy its obligations, and it does not see any particular need to further implement CEDAW through domestic policies.

This approach was criticised by the CEDAW Committee, which noted that the British government's answers to questions indicate that the government considers its obligations under CEDAW to be less enforceable than obligations under the European Convention of Human Rights. The tendency of the government to elevate the European Convention above CEDAW is problematic because the European Convention does not contain an independent right to equality, rather, it only guarantees equality in the enjoyment of other rights stated in the European Convention. These rights are far more limited than those provided in CEDAW. As the CEDAW

51. Angela McRobbie, *Feminism and the Third Way*, 64 FEMINIST REV. 97, 105 (Spring 2000).

Committee noted in its Concluding Comments:

[T]he European Convention on Human Rights and Fundamental Freedoms does not provide for the full range of women's human rights incorporated in the Convention on the Elimination of All Forms of Discrimination Against Women. In particular, the European Convention does not provide for the rights to equality in Article 2 of the Convention. Nor does it contain a positive obligation for governments to eliminate indirect discrimination as defined in Article 1 of the Convention or provide for temporary special measures as set out in article 4.1 of the Convention.⁵²

It is also noteworthy that the documents relating to CEDAW rarely make their way into the UK's domestic political process. After the CEDAW Committee had completed its last review of the government report, there was no formal or public debate in the UK on the Concluding Comments produced by the Committee. This is despite the fact that the Committee stated that there should be widespread dissemination of its comments "in order to make the people of the United Kingdom, and particularly government administrators and politicians, aware of the steps that have been taken to ensure *de jure* and *de facto* equality for women and the further steps that are required in that regard."⁵³

The Committee also stated that its recommendations should be distributed to human rights and women's organisations. If this were done it might help women's groups to see the potential value of the CEDAW and encourage them to make greater use of the Concluding Comments in their campaigns on particular issues.

It would also be useful if the government's report and the Concluding Comments could be tabled before Parliament for debate in either house or if it was submitted to a Parliamentary Committee for discussion. Interestingly, a Human Rights Joint Committee ("HRJC") was recently established in Parliament to consider matters relating to human rights in the UK, particularly in relation to the Human Rights Act of 1998. The HRJC could also consider the CEDAW Committee's Concluding Comments and those of the other core international human rights treaties. Alternatively, there could be a Parliamentary Committee on Equality which could consider the Concluding Comments, as well as the Beijing Platform for Action and other issues relating to implementation of CEDAW. One

52. *CEDAW Report*, *supra* note 42, ¶ 300.

53. *CEDAW Report*, *supra* note 42, ¶ 318.

encouraging sign is that the WNC has supported this approach, suggesting that such a committee could “address women’s concerns to see what is being achieved . . . within government . . . and give a focus on the wide range of equality work on women. . . .”⁵⁴ Another way of encouraging compliance would be to adopt a system of pre-legislative scrutiny, which would require the minister or other person introducing the bill to certify that the bill complies with CEDAW.⁵⁵

D. Judicial Use of CEDAW in the United Kingdom

Whenever the impact of CEDAW is examined in a particular jurisdiction, the two key questions are whether the judiciary is aware of the Convention, and if so, whether the judiciary is willing to enforce it. Bayefsky maintains that: “Domestic courts can serve as a missing link between promulgation and realisation of international human rights norms to the benefit of both international and domestic law.”⁵⁶ Unfortunately, as the recently completed *First CEDAW Impact Study* indicates, judges frequently fail to apply CEDAW to questions involving women’s rights.⁵⁷

This is equally true in the UK, where it is almost impossible to locate judicial references to CEDAW. One reason for its under-use is that CEDAW is not incorporated into UK domestic law, and its legal effect is therefore limited. In accordance with the doctrine of parliamentary sovereignty, treaties are not directly enforceable in the UK courts unless they have been expressly incorporated into domestic law.⁵⁸ However, as noted later in this section, there is a statutory presumption that Parliament intends to comply with its international obligations unless otherwise stated.⁵⁹ Thus, the UK

54. See WOMEN 2000 REPORT, *supra* note 46, at 61.

55. For a discussion of the issue of pre-legislative scrutiny of human rights, see David Kinley, *Parliamentary Scrutiny of Human Rights: A Duty Neglected?*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 158-184 (Phillip Alston ed., 1999).

56. Anne F. Bayefsky, *General Approaches to Domestic Application of International Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 351-374 (Rebecca J. Cook ed., 1994).

57. *The First CEDAW Impact Study: Final Report* (Centre for Feminist Research and The International Women’s Rights Project 2000), available at <http://www.yorku.ca/iwrp/CEDAW%20Impact%20Study.htm> (last visited Feb. 24, 2003) [hereinafter *First CEDAW Impact Study*]. Of special interest is the Country Report on Nepal by Sapana Pradhan Malla.

58. *Mortensen v. Peters*, 14 Scottish Law Times 227, 100, High Court of Justiciary (1906).

59. *R v. Chief Immigration Officer Heathrow Airport*, ex parte Salamat Bibi, 3

courts could look to CEDAW for guidance in interpreting domestic legislation if they were inclined to do so. It may be that UK judges are not adequately informed about CEDAW, as it does not attract nearly as much interest and publicity as the European Convention on Human Rights ("ECHR"). (Although the ECHR was also unincorporated until the enactment of the Human Rights Act 1998, it did provide for a right of individual petition and therefore gave rise to a body of case law decided by the European Court of Human Rights.)

The landmark case of *Islam v. Secretary of State for the Home Department*,⁶⁰ decided by the House of Lords in 1999, is an exceptional case in that it contains a reference to CEDAW, albeit a quite limited one. In this case, the House of Lords had to decide whether two women asylum seekers could claim refugee status in the UK within the meaning of Article 1A(2) of the Refugee Convention⁶¹ and the Protocol on the Status of Refugees.⁶² The women had separated from their husbands after suffering domestic violence, and feared persecution if they were returned to Pakistan. In particular, they argued that they could, upon their return, suffer death by stoning in accordance with Pakistan's Sharia law. It was accepted that the women had a well-founded fear of persecution if returned, and would not receive protection from the Pakistani authorities. Thus the case largely turned on the question of whether they would suffer persecution because they were part of a particular social group.

The House of Lords decided that the Pakistani women were part of a "particular social group," because (1) they were discriminated against as a group, (2) they were denied their fundamental human rights, and (3) the Pakistani authorities offered them no protection from violent abuse.⁶³ Lord Hoffman noted that discrimination against women is contrary to international human rights standards, and that Pakistan had actually ratified CEDAW in 1996. Unfortunately, Lord Hoffman did not then proceed to discuss the fact that since the UK has also ratified CEDAW, the courts should interpret UK refugee law in accordance with the principles of non-discrimination. Article 2 of CEDAW provides that a State Party undertakes to "establish legal protection of the rights of women on an equal basis with men and to

All E.R. 843 (C.A. 1976).

60. *Islam v. Secretary of State for the Home Department* Immigration Appeal Tribunal and Another, 2 A.C. 629, 655 (1999).

61. Convention Relating to the Status of Refugees, 1951, 189 U.N.T.S. 150.

62. Protocol on the Status of Refugee, 1967, 606 U.N.T.S. 8791.

63. *Islam*, *supra* note 60, at 652-655.

ensure through competent national tribunals and other public institutions the effective protection of women.” If an asylum law appears to be gender-neutral but really takes no account of women’s experience of persecution, then the State Party would arguably be in breach of its obligations under CEDAW. Thus, the House of Lords could have applied the presumption that Parliament intended to comply with its international obligations unless otherwise stated.⁶⁴ Through this approach, the House of Lords could have adopted an interpretation of the asylum law that would not discriminate against women. Unfortunately, the House of Lords did not take this opportunity to hold that CEDAW could be relied upon in interpreting domestic law.

CEDAW was also ignored in the recent landmark case of *R v. A*,⁶⁵ where the House of Lords considered the compatibility of the rape shield laws with the European Convention on Human Rights. Discussion of CEDAW in the context of this important issue of women’s human rights could have led the House of Lords to underline the fact that violence against women is a form of discrimination, and that the UK has an obligation under Article 2(C) of CEDAW to “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.”

Byrnes has studied several examples in which courts in other commonwealth jurisdictions have referred to CEDAW. He argues that the extent to which unincorporated conventions are used depends largely upon judicial attitudes. While some judges may have reservations about using unincorporated treaties as an aid to interpretation, “a judiciary which is prepared to be open to international influences and to draw on international jurisprudence has some scope for doing so in most common law systems.”⁶⁶ For example, in *R v. Ewanchuk*, a criminal law case involving sexual assault, the Canadian Supreme Court rejected a defence of “implied

64. *R v. Chief Immigration Officer Heathrow Airport, ex parte Salamat Bibi*, 3 All E.R. 843 (C.A. 1976).

65. *Regina v. A*, (2001) U.K. H.L. 25, ¶ 52, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldjudgmt/jd010517/regina-1.htm> (last visited Mar. 26, 2003).

66. See Andrew Byrnes, *Human Rights Instruments Relating Specifically to Women, with Particular Emphasis on the Convention on the Elimination of All Forms of Discrimination Against Women*, in *ADVANCING THE HUMAN RIGHTS OF WOMEN: USING INTERNATIONAL HUMAN RIGHTS STANDARDS IN DOMESTIC LITIGATION* 37-57 (Andrew Byrnes et al. eds., 1997).

consent.”⁶⁷ The judgments of Judge L’Heureux-Dube and Judge Gonthier referred to CEDAW and General Recommendation 19 of the CEDAW Committee as authority for the principles that the definition of discrimination includes gender-based violence, and that state parties have an obligation to ensure that laws against sexual assault give adequate protection to women and respect their integrity and dignity.⁶⁸ Thus, the international materials assisted the judges in deciding that sexual violence is a denial of gender equality.⁶⁹ This is precisely the approach that could have been taken by the House of Lords in *R v. A*.⁷⁰

Of course, the extent to which courts look to international jurisprudence is also influenced by the submissions of the lawyers who appear before them. In particular, the reference to CEDAW in *R v. Ewanchuk* was probably facilitated by the interventions of Canadian women’s groups. These groups presented a feminist analysis to the court, including references to the relevant international obligations.⁷¹ In contrast, UK NGOs traditionally have not made extensive use of strategic litigation.

However, they have recently made more of an attempt to do so. For example, there was an intervention by several women’s organisations in the case of *R v. A*, which was referred to in the judgement of Lord Hope.⁷² Justice for Women also made an attempt to seek judicial review of the Home Secretary’s decision to admit the boxer Mike Tyson to the UK. Although this attempt failed, it attracted substantial publicity in the UK and may encourage other women’s groups to apply to intervene in future cases.⁷³ In general, it appears that the introduction of the Human Rights Act of 1998 has

67. *R v. Ewanchuk*, [1999] 1 S.C.R. 330.

68. *Id.* ¶ 71.

69. See Catherine Fraser, *R v Ewanchuk: A Case Study on the Meaning of Consent in Cases of Sexual Violence Against Women*, in BRINGING INTERNATIONAL HUMAN RIGHTS LAW HOME: JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF THE CONVENTION ON ALL FORMS OF DISCRIMINATION AGAINST WOMEN AND THE CONVENTION ON THE RIGHTS OF THE CHILD 163-167 (2000).

70. Regina, *supra* note 65.

71. The Women’s Legal Education and Action Fund (LEAF) and the Disabled Women’s Network of Canada (DAWN Canada) were intervenors in the case.

72. Regina, *supra* note 65, ¶ 54. Lord Hope referred to the joint written intervention of the Rape Crisis Federation of England and Wales, the Campaign to End Rape, the Child and Woman Abuse Studies Unit and Justice for Women.

73. See *Rape Crisis Centre Cannot Challenge Leave to Enter*, TIMES (London), July 18, 2000; Adrian Lee et al., *Tyson Prays as Women Lose Fight in Court*, TIMES (London), Jan. 18, 2000, at 5.

increased NGO interest in strategic litigation, despite the narrow rules of standing⁷⁴ and the difficulties third parties face in intervening in cases.⁷⁵ Francesca Klug has described this as a new zeitgeist, which has led many NGOs to re-brand themselves as human rights groups.⁷⁶ Perhaps this atmosphere will provide more opportunities for lawyers to refer judges to CEDAW, and may gradually make the courts more mindful of CEDAW and its place in the British legal system.

The next section of the article draws comparisons with Hong Kong, where CEDAW has been in force for a shorter period of time but is arguably having more impact upon law and policy as they affect women's rights.

III. The Implementation of CEDAW in Hong Kong

A. Introduction

CEDAW was not extended to Hong Kong until 1996, a decade after the UK ratified it. In addition, Hong Kong has only reported once to the CEDAW Committee.⁷⁷ Many NGO representatives have complained in interviews and in public forums that the Hong Kong government still does not genuinely embrace CEDAW. However, the treaty has already had some impact upon public policy, and the judiciary has already relied on CEDAW in a recent action for judicial review as a tool for interpreting the local Sex Discrimination Ordinance. In this section, we analyse these developments and the role played by women's NGOs, both in the campaign for CEDAW's extension to Hong Kong and in the CEDAW enforcement process.

B. The Campaign for CEDAW in Hong Kong

Unlike women in the UK, the Hong Kong women's movement had

74. Under section 7(1)(3) of the Human Rights Act of 1998, those bringing proceedings against a public authority must be victims. The wider formulation of sufficient interest was rejected.

75. The government rejected suggestions that procedural rules be included whereby interested organisations could intervene during litigation. See AILEEN MCCOLGAN, *WOMEN UNDER THE LAW: THE FALSE PROMISE OF HUMAN RIGHTS* 268-269 (2000).

76. FRANCESCA KLUG, *VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM'S NEW BILL OF RIGHTS* 6 (2000).

77. *Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women* (Nov. 9, 1998), available at www.hku.hk/ccpl/cedaw/ccplcedawsubmission.html (last visited Feb. 24, 2003) [hereinafter *Initial Report*].

to lobby for many years before CEDAW was extended to Hong Kong. This was unusual, since the normal practice of the British government was to include its dependent territories when it ratified an international human rights treaty.⁷⁸ However, when the United Kingdom ratified CEDAW in 1986, the Hong Kong government expressly requested that it *not* be applied to Hong Kong. On several occasions after the UK's ratification, local women's groups asked the Hong Kong government to state its position on the convention. The government would only say that CEDAW was under consideration, and that it needed more time to consider the implications that it would have for existing legislation and policies.⁷⁹ In fact, the Hong Kong government probably understood the implications quite well, and knew that it was not ready to comply with CEDAW. In the mid-1980s, there was no right to equality in the colonial constitution and no law prohibiting discrimination or sexual harassment. Although international human rights conventions that applied to Hong Kong did assert a general right to equality,⁸⁰ they were not yet incorporated into any domestic legislation and were largely ignored. As a result, sex discrimination was openly practised and accepted as the norm.

For example, women were legally barred from inheriting much of the land in the New Territories until 1994. In about one-third of New Territories villages they were also barred from voting for or standing for election for village representative. There were also numerous discriminatory "protective regulations" and virtually every newspaper contained sex specific job advertisements seeking, for example, "male engineers" and "female clerks."⁸¹

78. This is how the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination all came to apply to the "crown colony" of Hong Kong. See ANDREW BYRNES & JOHANNES CHAN, PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 298 (1993).

79. See, e.g., *Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights* ¶ 26 (Oct. 1989). See also *Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights: An Update* ¶ 89 (Mar. 1991), available at www.hku.hk/law/conlaawhk/sourcebook/human%20rights/40012.htm (last visited Feb. 24, 2003) [hereinafter *Third Periodic Report by Hong Kong: An Update*].

80. For a discussion of the equality provisions of these conventions, see Andrew Byrnes, *Equality and Non-Discrimination*, in HUMAN RIGHTS IN HONG KONG (Raymond Wacks ed., 1992).

81. For discussion of these and other examples of discrimination and the lack of anti-discrimination law at that time, see Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. OF TRANSNAT'L L. 335, 338-348 (1996), and Harriet Samuels, *Women and the Law in*

In lobbying for CEDAW and a sex discrimination law, women's organisations frequently pointed out that the government was failing to give Hong Kong women the level of protection that British women enjoyed. However, the colonial government justified the differential standards on two grounds: (1) it had an obligation to respect traditional Chinese customs; and (2) CEDAW and anti-discrimination legislation would interfere with the laissez-faire economic policies that were considered essential to Hong Kong's economic development. Since the government and legislature were entirely appointed there was little that the women's movement could do to pressure the government to change its position.

Had it not been for the "transition period" prior to 1997, CEDAW might still be missing from Hong Kong's legal system. However, in the last years of British rule, Hong Kong underwent enormous legal and political development.⁸² Although these changes started in 1984, immediately after the signing of the Joint Declaration (the treaty by which the British government agreed to return Hong Kong to China in 1997), they did not reach their peak until the years following June 4, 1989. Approximately one million people (about twenty percent of Hong Kong's population) marched in the streets to protest the Tianamen Square massacre, and demands for democracy and legal protection of human rights in Hong Kong dramatically increased.

In an effort to rebuild confidence, the Hong Kong government announced a package of proposals, including a domestic Bill of Rights Ordinance ("Bill of Rights"). The draft Bill of Rights was essentially copied from the ICCPR, which includes the right to equality and non-discrimination. Although the Bill of Rights itself was not a superior law, it had the effect of repealing prior inconsistent laws, and the legislature was prohibited from enacting subsequent laws that were inconsistent with the ICCPR (by virtue of a simultaneous amendment to the colonial constitution, the Letters Patent). Several women's organisations participated in the public consultation on the draft Bill of Rights, hoping to obtain more detailed language on the right to equality and to use the Bill as a weapon against sex discrimination. Unfortunately, as a result of extensive lobbying by the business community, Section 7 of the Bill of Rights was amended shortly before its enactment, so as to limit its

Hong Kong: A Feminist Analysis, in HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY (Raymond Wacks ed., 1993).

82. This section briefly summarizes those developments. For a more complete analysis, see Petersen, *supra* note 81.

application to the government and public bodies. The amendment significantly reduced the extent to which women could use the Bill of Rights to challenge discriminatory practices in the private sector.

Indeed, the Court of Appeal later interpreted Section 7 as preventing a party from using the Bill of Rights even to challenge discriminatory laws that affected private rights.⁸³ As a result of this decision (and the high cost of litigating in Hong Kong), the Bill of Rights ultimately had little direct impact on discrimination in Hong Kong. Nonetheless, its enactment was a significant step, as it was the first law in Hong Kong to publicly recognise a right to equality.

Moreover, since the Bill of Rights incorporated the ICCPR into domestic law, it also helped to educate women's groups and other NGOs about the ICCPR and the ways in which it might be used to influence public policy. Even while the proposed Bill of Rights was being considered by the legislature, NGOs became more interested in writing shadow reports to the United Nations Human Rights Committee, commenting upon the Hong Kong government's reports under the ICCPR.⁸⁴ The reports by women's NGOs cited examples of inequality in Hong Kong society, complained about the lack of anti-discrimination legislation, and called for CEDAW to be extended to Hong Kong.⁸⁵ NGOs also used the debate on the proposed Bill of Rights to educate and lobby members of the Legislative Council. The first direct elections to the legislature (for a limited number of seats) were held in 1991, giving women the opportunity to ask candidates to state their positions on gender issues. Recognising the importance of the women's vote, several legislators became strong supporters of the equality movement. For example, Emily Lau, one of the first group of directly elected legislators, formed an Ad Hoc Group in the Legislative Council to study women's issues. In December 1992, she agreed to assist the campaign for CEDAW by introducing the following motion for debate in the Legislative Council:

[T]his Council calls upon the Administration to support the extension to Hong Kong of the United Nations Convention on the

83. Tam Hing-ye v. Wu Tai-wai, H.K. P.L.R. 261 (1991).

84. For discussion of how Hong Kong NGOs participated in the reporting process under several international human rights treaties, see Andrew Byrnes, *Uses and Abuses of the Treaty Reporting Procedure: Hong Kong Between Two Systems*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, *supra* note 24, at 291-300.

85. Report of the Hong Kong Council of Women on the Third Periodic Report by Hong Kong Under Article 40 of the International Covenant on Civil and Political Rights (1991).

Elimination of all Forms of Discrimination Against Women and to request the British Government to take the necessary action to so extend the Convention forthwith.

The speeches made during the debate on Lau's motion revealed the impact that limited democracy had had upon the legislature. Many legislators spoke in favour of the motion, citing evidence of sex discrimination that had been submitted to them by women's groups. In the end, although the government strongly opposed the motion, all members present voted in favour of it (except for the three government *ex officio* representatives, who chose to abstain in the face of certain defeat).⁸⁶

The vote was an important victory for the women's movement, and it left the government in a difficult position. Although it was not legally obligated to implement a motion passed by the Legislative Council, it also could not simply ignore the views of the only arguably representative body, the partly elected legislature. Instead, the government bought some additional time by insisting that applying CEDAW to Hong Kong would represent such a significant shift in policy that it could not be done without first consulting the public directly. It thus announced that it would conduct its first formal public consultation on the issue of gender equality, and issued the *Green Paper on Equal Opportunities for Women and Men*.⁸⁷ The government did its best to downplay the examples of sex discrimination in the consultative document, but this only made women activists more determined to articulate their demands. It also made other groups more supportive. In addition to women's organisations, numerous other NGOs and individuals made submissions.⁸⁸ At the end of the five-month consultation period, the Secretary for Home Affairs was forced to concede that the majority of responses supported the extension of CEDAW to Hong Kong and the enactment of a law prohibiting sex discrimination.⁸⁹

At this point, the debate on whether CEDAW should be applied to Hong Kong essentially ended. The key questions became: (1) how long

86. See *Hong Kong Legislative Council Official Record of Proceedings* at 1451 (Dec. 16, 1992) (on file with author).

87. HONG KONG GOVERNMENT, *GREEN PAPER ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN* (1993) (on file with author).

88. HONG KONG GOVERNMENT, *GREEN PAPER ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN: COMPENDIUM OF SUBMISSIONS* (May 1994) (on file with author).

89. S. Y. Yu, *U.N. Convention to Be Adopted*, S. CHINA MORNING POST, Dec. 31, 1993, at 2.

would it take; (2) what reservations would be included; and (3) what sort of domestic legislation would be enacted to comply with it? To some extent the first two issues were affected by the need to negotiate with China in order for the treaty to apply to Hong Kong beyond 1997. However, this was not a major stumbling block since China itself had already ratified CEDAW (although it certainly had not implemented it in the way that women's organisations wanted to see it implemented in Hong Kong).

It was the third issue—the need for domestic sex discrimination legislation—that had the potential to delay the extension of CEDAW. Indeed, under the old colonial order, the government might well have pondered that question for at least ten years. It could have done so because all new legislation was traditionally drafted by the government. The appointed legislators were only part-time legislators, who attended to their other professions most of the time and never drafted substantive legislation. However, in the 1990s, certain legislators became more assertive, and the government found that it was no longer entirely in charge of the legislative timetable. During the consultation exercise on CEDAW, one independent legislator, Anna Wu, had started to draft her own Equal Opportunities Bill (“EOB”).⁹⁰ Based upon Western Australian legislation, the EOB sought to prohibit discrimination on a wide range of grounds including sex, marital status, pregnancy, family responsibility, disability, sexuality, race, age, and political and religious conviction. Wu was the first legislator to draft a bill covering an entire new area of law. The government initially ignored her bill, dismissing it as too radical to be taken seriously. However, after Wu distributed her draft bill for public comment, the Democratic Party (which held the largest number of directly elected seats in the legislature) and a number of independent legislators pledged to support her bill. She then formally introduced her bill, in July 1994, and a Bills Committee began to study it.

At this point the government realised that it had to act quickly. Since the Legislative Council was due to become fully elected in 1995, even pro-business legislators would find it difficult to oppose Wu's bill—unless they could be presented with a more conservative alternative. The government thus announced that it would introduce its own Sex Discrimination Bill and Disability Discrimination Bill. These two areas of discrimination had attracted the most support, and the

90. Equal Opportunities Bill (1994), HONG KONG GOV'T GAZETTE, Legal Supplement No. 3, July 1, 1994, at C991-C1275.

government hoped that by promising to legislate against them it could prevent Wu's broader bill from being enacted. To an extent, this strategy worked for the government—the EOB was defeated and the other grounds of discrimination covered in it, such as race, age, and sexuality, still have not been legislated against.⁹¹ However, Wu did succeed in getting certain amendments added to the government's original bill, in order to make it more compliant with CEDAW. For example, Wu persuaded the government to add an exemption for voluntary special measures (affirmative action),⁹² which is provided for in Article 4 of CEDAW. The government also agreed to widen the scope of the prohibition on pregnancy discrimination (in the original bill it was limited to the field of employment) and to expressly prohibit student-to-student sexual harassment.⁹³ However, many of Wu's proposed amendments were strongly opposed by the government, and only a few of these contested amendments were eventually enacted by the legislature.⁹⁴ The Governor also used his constitutional powers to prevent Wu from introducing some of her amendments, including one that would have expressly included the implementation of CEDAW and other international conventions relating to discrimination within the powers of the Equal Opportunities Commission.⁹⁵

91. The only exception is that the Family Status Discrimination Bill was enacted in June 1997, as well as a bill amending the Sex Discrimination Ordinance and Disability Discrimination Ordinance. For discussion of the impact of these amendments and the difficulties in enacting broader anti-discrimination laws in post-1997 Hong Kong, see Carole J. Petersen, *Equal Opportunities: A New Field of Law for Hong Kong*, in *HONG KONG'S NEW LEGAL ORDER* (Raymond Wacks ed., 1999).

92. The exemption now appears in Section 48 of the Sex Discrimination Ordinance.

93. See Sex Discrimination Ordinance, section 39(3). This provision has been applied in the case of *Yuen Sha Sha v. Tse Chi Pan*, 1 H.K.C. 731 (1999), in which a female university student was awarded damages after discovering that a male student had been secretly filming her in her dormitory room. For a discussion of the case (and a critique of the rather low damages awarded), see Carole J. Petersen, *Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong's Anti-Discrimination Laws*, 29 H.K. L.J. 178 (1999).

94. The legislature did adopt a few important amendments over the government's objection, including one that applied the new law to elections for village representative in the New Territories region of Hong Kong (which was applied in the case of *Secretary for Justice & Others v. Chan Wah & Others*, 4 H.K.C. 428 (2000)). For a more detailed discussion of the amendments proposed by Wu and the Bills Committee, see Petersen, *supra* note 81, at 380-383.

95. Clause XXIV(2)(c) of the Hong Kong Royal Instructions (part of Hong Kong's colonial constitution) provided that a member of the Legislative Council must obtain permission from the Governor in order to introduce any bill or amendment that will place a charge upon the public revenue. With respect to this proposed

The Sex Discrimination Ordinance was thus enacted in the summer of 1995 and was brought into force in 1996. The Equal Opportunities Commission was established in May 1996 to assist with enforcement of the two new laws. CEDAW was then finally extended to Hong Kong with the consent of both the British and Chinese governments. China agreed that CEDAW would continue to apply to Hong Kong after 1997 and that it would report on behalf of Hong Kong to the CEDAW Committee. A number of reservations were entered, including one for the controversial "Small House Policy." This is a government policy that allows indigenous *male* residents of the New Territories to build a house, often on government land at a concessionary rate. The value of these properties has soared in the past twenty years. The government is in a very difficult position because it does not have enough land to extend the policy to women and thus would probably have to abolish it if the reservation in CEDAW were removed.⁹⁶ As a result, its approach to the issue has been to continually claim that the policy is under review, but never to announce any conclusions arising from that review.⁹⁷

Women had also hoped that a Women's Commission would be created, one that could serve as the "national machinery" for the implementation of CEDAW in Hong Kong. Although the Equal Opportunities Commission was welcomed by the women's movement, it did not fully satisfy their desire for a Women's Commission. The Equal Opportunities Commission is charged with enforcing the Sex Discrimination Ordinance (as well as the disability legislation), but it has almost no influence over government policy making. Thus, the need for a local enforcement machinery for CEDAW would continue to

amendment, the government argued that it would give the Equal Opportunities Commission additional responsibilities and therefore place a charge on public revenue. Anna Wu disputed this, arguing that the amendment did not require additional funding as it would simply give the Commission greater flexibility in deciding how to spend its budget. However, the President of the Legislative Council decided that this amendment would have a charging effect and could not be moved without the Governor's permission, which was not given. For further discussion of how this power was used to prevent Wu from introducing other amendments (as well as her own Human Rights and Equal Opportunities Commission Bill), see Petersen, *supra* note 81.

96. The government also inserted an exemption for the small house policy in the Sex Discrimination Bill and efforts to remove it by legislators Anna Wu in 1995 and Christine Loh in 1997 have thus far failed.

97. For example, in its *Initial Report* to the CEDAW Committee the Hong Kong government stated that it hoped to complete its review by 1998, but no results have been announced to the public as of 2002. *Initial Report*, *supra* note 77, ¶ 173. For additional information on the Small House Policy, see Petersen, *supra* note 81, at 343-344.

be a rallying point for women's organisations as they prepared for Hong Kong's Initial Report under Article 18 to the CEDAW Committee.

C. The Role of Hong Kong NGOs in the CEDAW Reporting Process

Similar to the UK, the women's movement in Hong Kong is extremely diverse.⁹⁸ Most women's groups now operate in Cantonese, the version of Chinese that is spoken by the majority of Hong Kong people. However, there are still a number of groups that operate in English because they include expatriate members and/or because they are professionally oriented. In the colonial period, these English-speaking groups were quite visible because the language of the government and the legislature was still primarily English. This changed during the transition period leading up to 1997, and most NGO lobbying of the Hong Kong government now occurs in Cantonese. However, certain English-speaking groups, such as the Association of Business and Professional Women and Women in Publishing, do still participate in the lobbying process. There are also a number of organisations that operate primarily in Cantonese but can also lobby in English. For example, the Association for the Advancement of Feminism, known as AAF, maintains a partly bilingual web-page and produces documents in both languages.⁹⁹ Similarly, the Hong Kong Federation of Women's Centres¹⁰⁰ (which provides a significant array of services for women, including a legal clinic) produces a certain amount of literature in English and has English-speaking staff, although it operates primarily in Cantonese.

Of course, it is easier for the bilingual groups to participate in the CEDAW process. Although the government has distributed CEDAW and related materials in Chinese as well as English, much of the government's publicity on it is quite simplistic and says very little about the potential of CEDAW. In contrast, the bilingual groups can access a much broader range of information on CEDAW. These groups have often formed coalitions with groups that are not bilingual, allowing a broader range of groups to produce lobbying documents in both

98. See Catherine W. Ng & Evelyn G.H. Ng, *The Concept of State Feminism and the Case for Hong Kong*, 8 ASIAN J. OF WOMEN'S STUDIES 7, 20-22; Lai et al., *Women's Concern Groups in Hong Kong*, in *ENGENDERING HONG KONG SOCIETY: A GENDER PERSPECTIVE OF WOMEN'S STUD.* (F. M. Cheung ed., 1997).

99. The webpage of AAF can be found at <http://www.aaf.org.hk/htm> (last visited Nov. 5, 2002).

100. The webpage of the Hong Kong Federation of Women's Centres can be found at http://www.womencentre.org.hk/main_acti.html (last visited Nov. 5, 2002).

languages. Many issue-specific groups (such as Harmony House, which operates a shelter for victims of domestic violence, the Hong Kong Association for the Survivors of Women Abuse, and the Family Planning Association) have also joined these coalitions. This allows groups with expertise in particular areas to feed their knowledge into the broader campaign for women's equality.

However, Hong Kong women's groups do often differ with respect to their political positions. Some groups are strongly associated with the general human rights and pro-democracy movements in Hong Kong. In contrast, other groups are considered much more conservative and not particularly feminist. The Federation of Hong Kong Women (which is not to be confused with the Hong Kong Federation of Women's Centre's, mentioned above) is a very prominent conservative group and is widely viewed as a "pro-China" organisation.¹⁰¹ This group has actually taken some positions that undermined women's equality (such as proposing an amendment to the Sex Discrimination Ordinance capping damages at a very low amount) and thus it has attracted some hostility from the more feminist organisations.¹⁰² Hong Kong women's groups have also differed on the issue of sexuality. While some groups support equal rights for lesbians and gays, others declined to endorse legislation that would have prohibited discrimination on the ground of sexuality.¹⁰³ However, the lesbian-rights group Queer Sisters has been included in recent coalitions that are lobbying on women's rights generally.

It should also be noted that there are a number of NGOs that represent foreign domestic helpers. These groups are slowly

101. See the website of the Hong Kong Federation of Women, at <http://www/hkfw.org.htm>, which lists, as its objectives "to support the Sino-British Joint Declaration and the Basic Law . . . and help to maintain the prosperity and stability of Hong Kong."

102. The amendment, which capped damages at HK \$150,000 (about US \$20,000), was proposed by Mrs. Peggy Lam, one of the founding members of the Federation of Women who was also a member of the Legislative Council at that time. The amendment was not supported by the Bills Committee but received significant support from the other pro-business legislators and was enacted. Fortunately, the cap was repealed in June 1997 by a private members' bill proposed by Christine Loh, a directly elected legislator at that time. For a discussion of the cap on damages and the legislation that removed it, see Carole J. Petersen, *Hong Kong's First Anti-Discrimination Laws and Their Potential Impact Upon Employment*, 27 H.K. L.J. 324, 350-351 (1997).

103. For a discussion of the decriminalisation of certain types of gay sex and the unsuccessful campaign for sexuality discrimination legislation in Hong Kong, see Carole J. Petersen, *Values in Transition: the Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L. REV. 337 (1997).

becoming more visible in the debate on human rights in Hong Kong.¹⁰⁴ Although the majority of associations that serve foreign domestic helpers are social or service oriented, some have explicitly political intentions, which may include lobbying against reductions in the minimum statutory wage or against examples of discrimination against them.¹⁰⁵ Some local women's groups have supported the foreign domestic helpers in their campaigns.¹⁰⁶ However, it cannot be said that Hong Kong women *generally* support the foreign domestic helpers, and their interests do often conflict. For example, unemployed local women view foreign domestic helpers as a source of competition, and women who employ foreign domestic helpers regularly argue that their minimum wage should be reduced in the current economic recession.

Given their diversity, Hong Kong NGOs have done a reasonably good job of banding together on certain key issues. Many diverse groups lobbied for the extension of CEDAW to Hong Kong, the enactment of the Sex Discrimination Ordinance, and the creation of a Women's Commission.¹⁰⁷ And while many organizations, particularly those that operate exclusively in Chinese, still lack adequate information on CEDAW, a significant number have already taken an active role in the CEDAW enforcement process. In this context, Hong Kong has benefited enormously from the presence of Andrew Byrnes, an Australian lawyer who was a member of the Faculty of Law at the University of Hong Kong from 1989-2001. Byrnes is a

104. See, e.g., Carol G.S. Tan, *Why Rights Are Not Enjoyed: The Case of Foreign Domestic Helpers*, 30 H.K. L.J. 354 (2000); Raymond Wacks, *Domestic Helpers' Privacy*, 30 H.K. L.J. 361 (2000).

105. See NICOLE CONSTABLE, *MADE TO ORDER IN HONG KONG: STORIES OF FILIPINA WORKERS* 168 (1997).

106. See, e.g., COALITION FOR MIGRANTS RIGHTS, *STATEMENT ON THE 111TH INTERNATIONAL LABOUR DAY* (May 1, 2001), available at <http://www/asian-migrants.org/news/98869909818798.php> (last visited Feb. 24, 2003). This statement was endorsed by numerous organisations, including some local Hong Kong groups, such as the Movement Against Discrimination and the Association for the Advancement of Feminism.

107. See, e.g., *The Platform of the Hong Kong Coalition of Women's Organizations: The Need for Legislation Prohibiting Discrimination on All Grounds Related to Gender* (1995), signed by thirteen women's organizations (both English-speaking and Chinese speaking groups) and submitted to the Legislative Council's Bills Committee to study the Equal Opportunities Bill. See also HONG KONG WOMEN'S COALITION ON EQUAL OPPORTUNITIES, *NGO REPORT ON WOMEN IN HONG KONG* (originally written for the Fourth World Conference on Women in Beijing, September 1995 and updated for the Second East Asian Women's Forum, August 22-24, 1996) (on file with authors).

recognised expert on CEDAW,¹⁰⁸ and has worked with many members of the CEDAW Committee.¹⁰⁹ Before CEDAW was extended to Hong Kong, he organised regular conferences and seminars on the human rights treaties that did apply to Hong Kong (such as the ICCPR and the ICESCR). He also encouraged NGOs, including women's organizations, to draft shadow reports and helped to submit them to the relevant treaty bodies. Byrnes also invited international experts on equality issues to come to Hong Kong to speak at conferences and meet with local women's groups. Thus, by the time that CEDAW was actually extended to Hong Kong in 1996, a small core of women's groups were reasonably well versed in its potential, and were somewhat familiar with the reporting process for international human rights conventions.

Given this familiarity, several women's groups were anticipating Hong Kong's Initial Report to the CEDAW Committee, which was due in October 1997. Unfortunately, public commentary on the report was somewhat hampered by the short period of time between the date that the report became available and the dates of the hearings before the CEDAW Committee. This was not actually the fault of the Hong Kong government. The Home Affairs Branch followed the appropriate formal steps. It published a draft outline of its report (although with very little text), added some items suggested by women's organisations, and completed its report on time. However, the Hong Kong government could not submit its report directly to the United Nations since it is only a Special Administrative

108. For examples of his many publications in the field, see *Using International Human Rights Law and Procedures to Advance the Women's Human Rights*, in WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW – VOLUME 2: INTERNATIONAL COURTS, INSTRUMENTS, AND ORGANISATIONS AND SELECT REGIONAL ISSUES AFFECTING WOMEN 79-118 (Kelly D. Askin & Doreen M. Koenig eds., 2000); *Human Rights Instruments Relating Specifically to Women, With Particular Emphasis on The Convention on the Elimination of All Forms of Discrimination Against Women*, in ADVANCING THE HUMAN RIGHTS OF WOMEN: USING INTERNATIONAL INSTRUMENTS IN DOMESTIC LITIGATION: PAPERS AND STATEMENTS FROM THE ASIA/SOUTH PACIFIC REGIONAL JUDICIAL COLLOQUIUM, HONG KONG 39-57 (May 20-22, 1996) (Andrew Byrnes et al. eds., 1997), available at <http://www.lawlib.utoronto.ca/Diana/fulltext/byrne.htm> (last visited Feb. 24, 2003); and Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination Against Women?*, 21 BROOK. J. INT'L L. 679 (1996).

109. Byrnes has a long association with the International Women's Rights Action Watch (IWRAP), the international network that was one of the first NGOs to focus on the Women's Convention and actively support the work of the CEDAW Committee.

Region, and the Chinese national government held the Hong Kong report without publishing it for almost one year, finally submitting it in August 1998. This left only about four months for Hong Kong NGOs to study the report, organise forums, and draft shadow reports.

Although the delay in submitting Hong Kong's report may have been deliberate, it was probably due simply to the desire of the national government to submit the Hong Kong report together with the update to China's third and fourth reports. But whatever the cause, the incident says something quite important about the difference between treaty obligations in Hong Kong and the rest of China. The national government would not see the need to publish a treaty report well before the Committee hearings because individuals and local organisations are not allowed to criticise it in any event. This is something that will hopefully change in China in the long term. However, in the short term, the Hong Kong government needs to make it clear to the national government (applying the principle of "one-country-two-systems") that the Hong Kong CEDAW report must be distributed promptly to the local community, allowing more time for public discussion before the CEDAW Committee meets in New York.

Despite the short time available, Andrew Byrnes and his colleagues at the University of Hong Kong did organise a conference on Hong Kong's Initial Report (held in November 1998), and a number of NGOs participated. As Erickson and Byrnes have discussed this particular conference in a previous article,¹¹⁰ we will not discuss it in detail here. However, it is noteworthy that Dr. Carmel Shalev, the member of the CEDAW Committee who was serving as country reporter for China, accepted the university's invitation and traveled to Hong Kong for the conference. Dr. Shalev addressed the conference, listened to the NGO papers, and also met with many local NGOs.¹¹¹ Given Hong Kong's small size and the last-minute nature of the conference, this was very fortunate and it certainly helped to raise the profile of the Hong Kong NGOs with the CEDAW Committee. Ten NGOs (with quite diverse membership) banded together to produce a major shadow report, which was very critical of the government.¹¹² The

110. See Moana Erickson & Andrew Byrnes, *Hong Kong and the Convention on the Elimination of All Forms of Discrimination Against Women*, 29 H.K. L.J. 350 (1999).

111. The CEDAW website of the Centre for Comparative and Public Law, University of Hong Kong, at <http://www.hku.hk/ccpl/cedaw.htm>, lists papers from the seminar, as well as other materials relevant to CEDAW in Hong Kong.

112. See *Submission to the CEDAW Committee on the Initial Report on Hong*

Home Affairs Panel of the Hong Kong Legislative Council also held hearings on the government report and encouraged NGOs to make submissions to the Panel. Although the government representatives who attended these hearings did not agree with the criticisms of the NGOs, they were compelled to give detailed responses and justify the positions taken in the government's written report to the CEDAW Committee.

The Hong Kong Equal Opportunities Commission also joined this lobbying effort, submitting its own NGO Report to the local conference, to the legislature,¹¹³ and to the CEDAW Committee.¹¹⁴ This was an important step in the development of the Equal Opportunities Commission, as it had been criticised by women's groups in its early years as being too timid. In its shadow report, the Equal Opportunities Commission condemned certain government policies and disagreed with the government's assessment of gender equality in Hong Kong. While some women's organisations thought that the Commission's report could have been more comprehensive, they were encouraged by the fact that it was willing to confront the government in an international forum. Most importantly, the Equal Opportunities Commission threw its full weight behind the women's groups' demand that a Women's Commission be created. The government had claimed that there was no need for a Women's Commission because certain top level "Policy Groups" in the government already provided the necessary co-ordination on women's issues among the various bureaus.¹¹⁵ However, the Equal Opportunities Commission took issue with this statement, noting in its shadow report that it was not aware of any Policy Group within government that "specifically and regularly addresses matters of

Kong Under the Convention on the Elimination of All Forms of Discrimination Against Women by Non-Governmental Organisations (1998), available at <http://www.hku.hk/ccpl/cedaw/cedaw4.html> (endorsed by Association for the Advancement of Feminism, Hong Kong Women Workers Association, Hong Kong Women Christian Association, Hong Kong Federation of Women's Centres, Association Concerning Sexual Violence Against Women, Hong Kong Association for the Survivors of Sexual Women Abuse, Family Ideal Community Education Project, Queer Sisters, Ziteng, and Hong Kong Human Rights Monitor) (last visited Feb. 24, 2003).

113. See *Initial Report*, *supra* note 77.

114. See EQUAL OPPORTUNITIES COMMISSION, NGO REPORT ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (Nov. 1998), available at www.eoc.org.hk/CE/cedaw (last visited Feb. 24, 2003) [hereinafter NGO REPORT].

115. *Initial Report*, *supra*, note 77, ¶ 19.

concern for women.”¹¹⁶ It also noted that in the absence of a Women’s Commission the NGOs were turning to the Equal Opportunities Commission. This was problematic because its powers were mainly limited to enforcing the Sex Discrimination Ordinance and it had very little influence over government policy making.

In addition to drafting shadow reports, a number of NGO representatives also took the initiative to travel to New York in early 1999, where they held an informal briefing for Committee members on Hong Kong issues and attended the Committee’s hearing on the Hong Kong report. The impact of the NGO reports and briefings could be seen in the questions asked by the CEDAW Committee. Although the hearing on Hong Kong’s Initial Report was a part of the combined third and fourth periodic reports of China, a separate half-day was set aside for Hong Kong. This was a significant amount of time given that only one and a half days were devoted to China as a whole. This may be partly attributable to the fact that it was Hong Kong’s first report and to China’s desire to illustrate the success of the “one-country-two-systems” model (something that Ambassador Qin Huasun pointed to in his opening statement).¹¹⁷ However, we would argue that the time given to the Hong Kong report was also a function of the amount of information fed to it by NGOs. In contrast, since there are no truly independent NGOs providing information from within the rest of China, the Committee has to rely on a combination of the government’s report and international NGOs.¹¹⁸

Members of the CEDAW Committee asked the Hong Kong government representatives several difficult questions. The government officials were well prepared and generally had long rehearsed answers. (The Home Affairs Branch of the Hong Kong Government has become quite skilled at producing long reports and rehearsed answers for the international human rights monitoring bodies since a good deal of attention has been paid to Hong Kong by these monitoring bodies in the last fifteen years.) Nonetheless, the Committee pursued the key issues in its Concluding Comments.¹¹⁹ For

116. NGO REPORT, *supra*, note 114, ¶ 4.

117. Erickson & Byrnes, *supra* note 110, at 361.

118. See, for example, the shadow report prepared by the New-York based group Human Rights in China, entitled *Human Rights Report on Implementation of Convention on the Elimination of All Forms of Discrimination Against Women in the People’s Republic of China*, available at <http://www.HRChina.org> (last visited Feb. 24, 2003).

119. See CEDAW Report, *supra* note 42, ¶¶ 308-336.

example, the Committee noted that Hong Kong's current electoral system—in which one-half of the legislators are elected by professional groups and other “functional constituencies”—tends to discriminate against women.¹²⁰ It also recommended that the government amend the Domestic Violence Ordinance in order to expand its coverage and provide for treatment and counseling of offenders, enhance services for victims of domestic violence, take steps to protect commercial sex workers and women migrant workers from abuse, and amend the statutory definition of rape so as to make clear that rape within marriage is a criminal offence.¹²¹ It also criticised the discrimination against women in the Small House Policy which was included in Hong Kong's reservations to CEDAW and also enjoys an express exemption from the Sex Discrimination Ordinance.¹²² Perhaps most importantly, the CEDAW Committee urged the Hong Kong government to establish a “high-level central mechanism with appropriate powers and resources to develop and coordinate a women-focussed policy and long-term strategy to ensure effective implementation of . . .” CEDAW.¹²³

D. The Impact of CEDAW on Public Policy in Hong Kong

In contrast to the UK, the Concluding Comments of the CEDAW Committee have been referred to in domestic policy debates. For example, the Home Affairs Panel of the Legislative Council held hearings to consider the Concluding Comments and asked the government to respond to them.¹²⁴ Certain legislators reiterated the Committee's call for the establishment of a women's commission, and expressed doubt about the government's claim that women's issues already received “high level” consideration by various Policy Groups within the existing government structure. Legislators

120. *Id.* ¶ 319.

121. *Id.* ¶¶ 323-328. It appears that the Committee did not fully understand the state of Hong Kong law at the time as it expressed its concern that rape is not considered a criminal offence in Hong Kong. *Id.* ¶ 323. In fact, since the Hong Kong statute was based upon English law, it is almost certain that a Hong Kong court would follow the decision of the English House of Lords in *R v. R*, 1 A.C. 599, 614 (1992), and hold that non-consensual sex between married persons constitutes rape. However, the Committee's comment highlighted the lack of clarity on the topic and the need to expressly provide for this in the legislation, which the Hong Kong government is now doing (as discussed later in this article).

122. *Id.* ¶ 333.

123. *Id.* ¶¶ 317-318.

124. See Hong Kong Legislative Council, Panel on Home Affairs, Minutes of Meeting, March 8, 1999, Legco Paper No. CB(2) 1650/98-99.

also challenged the government to provide examples of what these unnamed Policy Groups had done to address women's issues.¹²⁵

The Hong Kong government initially declined to adopt most of the CEDAW Committee's Concluding Comments.¹²⁶ In particular, the government continued to oppose creating a women's commission for the reason that it would be a "duplication of efforts and a waste of resources."¹²⁷ However, NGOs and legislators continued to press the government, knowing that it would eventually want to show some progress. In general, the government likes to promote Hong Kong as a territory that adheres to human rights standards and takes the international reporting process seriously. The resumption of Chinese sovereignty has made it all the more important for Hong Kong to be viewed as legitimate by the international human rights community. Thus, it appeared likely that the Hong Kong government would want to be able to point to at least one significant development in time for the next international event in the field of women's rights.

Fortunately, the next such event was scheduled for June 2000. "Beijing Plus 5" was the short name for a special session of the United Nations entitled "Women 2000: Gender Equality, Development and Peace for the Twenty-first Century." The five-day session was designed to assess the progress made by governments since the adoption of the Platform for Action, which had been approved at the Fourth World Conference on Women held in Beijing in September 1995.¹²⁸ At the conference in Beijing, the Hong Kong government had been able to report the recent enactment of the Sex Discrimination Ordinance, as well as the arrangements to establish the Equal Opportunities Commission and extend CEDAW to Hong Kong.

125. *Id.* ¶¶ 16-17.

126. See HONG KONG GOVERNMENT, INITIAL RESPONSE TO THE CONCLUDING COMMENTS, Legco Paper No. CB(2)1429/98-99(02) (attached as Annex D to the Information Note provided by the Home Affairs Bureau to the Legislative Council Panel on Home Affairs for its meeting on Mar. 8, 1999), available at www.legco.gov.hk (last visited Feb. 24, 2003).

127. See *Responses to Written Questions Raised by the UN Committee on the Elimination of All Forms of Discrimination Against Women on the Initial Report on the HKSAR under CEDAW*, Legco Paper No. CB(2)1429/98-99(02), at A43 (attached to the Information Note provided by the Home Affairs Bureau to the Legislative Council Panel on Home Affairs for its meeting of Mar. 8, 1999), available at www.legco.gov.hk (last visited Feb. 24, 2003).

128. For further information, see the website of the United Nations Development Programme, at <http://www.undp.org/gender/> (last visited Feb. 24, 2003).

However, five years later, the government itself had not done a great deal more to implement the Beijing Platform for Action. This gave women's organisations a particularly good opportunity to lobby the government to make some positive response to the Concluding Comments of the CEDAW Committee. Further pressure was put on the Hong Kong government when a local conference was planned in preparation for Beijing Plus 5 (organised by the Equal Opportunities Commission, the Women's Coalition on Equal Opportunities, and the University of Hong Kong). A few weeks before this conference, the Chief Secretary for Administration, the second-highest position in the executive branch, held by Mrs. Anson Chan at the time, offered to give an opening address. She used the address as an opportunity to announce the creation of a Women's Commission. This was another important achievement for Hong Kong women. Given the government's previous opposition, it almost certainly would not have come about this quickly but for the fact that NGOs and the Equal Opportunities Commission had emphasised the issue so strongly in their shadow reports to the CEDAW Committee, causing the Committee to stress the point in its Concluding Comments.¹²⁹ Of course, the follow-up by NGOs and legislators, after the Concluding Comments were issued, was equally important.

The Women's Commission was formally established in 2001 and thus far has not had a significant impact, at least not from the point of view of women's organisations.¹³⁰ Several Hong Kong women's groups have criticised its membership, which they fear is too conservative and not sufficiently experienced in women's issues. Their concerns were exacerbated when the first Chairwoman of the Women's Commission, Mrs. Sophie Leung, disassociated herself from the feminist movement in an interview held shortly after she was appointed.¹³¹ This comment led one female legislator directly to

129. For examples of how the Hong Kong government highlighted its decision to finally create a Women's Commission as an example of its response to the CEDAW Committee's Concluding Comments, see *Progress Report for the LegCo Panel on Home Affairs*, Legco Paper No. CB(2)2159/99-00(02), ¶¶4-5 (submitted to legislators for discussion on June 2, 2000), available at <http://www.legco.gov.hk> (last visited Feb. 24, 2003); and *The Report of the Hong Kong Special Administrative Region Government on the Implementation of the Beijing Platform for Action* (May 2000), available at <http://www.hwfb.gov.hk/hw/english/archive/other.htm> (last visited Feb. 24, 2003).

130. See the Women's Commission website for general information, at <http://www.women.gov.hk/eng/home.html> (last visited Mar. 7, 2003).

131. See Lilian Kwok, *Feminism Not My Way*, H.K. iMAIL, May 2, 2001, available at <http://www.aaf.org.hk/english/page5-hot.htm> (last visited Feb. 24, 2003).

condemn the entire Women's Commission as a form of "window dressing," which would not enhance gender equality.¹³² The placement of the Women's Commission within the structure of the government has also been somewhat controversial.¹³³ It is "independent" but serviced by the Health and Welfare Branch. Some activists have told us that they fear the Commission will focus entirely upon service issues, with little emphasis on political empowerment or any other issue that might bring it into conflict with existing government policies.¹³⁴

However, in our view, it is much too early to draw any conclusions regarding the impact of the Women's Commission. The Equal Opportunities Commission was also initially considered too timid but has now established itself as being quite assertive. Moreover, there may be some advantages to having a Women's Commission that can work on the inside of government. The enforcement role of the Equal Opportunities Commission naturally makes certain government officials rather suspicious of it, especially since it has now successfully sued the government in two major cases.¹³⁵ In contrast, government officials view the Women's Commission as being less threatening. Thus, it may be able to achieve more progress with respect to goals that require persuasion and co-operation. For example, the Women's Commission has made the introduction of "gender mainstreaming" into government policy one of its first major projects. The success of this project will be one of the first indications of its ability to be an agent for change in Hong Kong society. In May 2002, the Women's Commission also held a

132. *Id.*

133. See *Hong Kong Report 1998-2000*, available at <http://members.hknet.com/~hkwomen/womenrpt9800.html> (endorsed by ten women's organisations noting their fear that the Women's Commission would be at too low a level in the government and would focus only on health and welfare issues) (last visited Feb. 24, 2003).

134. For various public statements on the Women's Commission issued by the AAF and the recently formed Hong Kong Women's Coalition on Equal Opportunities (which regularly comments upon the work of the Women's Commission), see AAF, *supra* note 99.

135. One of these cases, *Equal Opportunities Commission v. Director of Education* 2 H.K. L.R.D. 690 (2001), is discussed later in this article. In the other case, *K, Y and W v. Secretary for Justice*, 3 H.K. L.R.D. 777 (2000), the Equal Opportunities successfully litigated under the Disability Discrimination Ordinance on behalf of three plaintiffs, each of whom had been denied jobs in a government department because he had a mother or father with a history of mental illness. For an analysis of these cases, see Carole J. Petersen, *The Right to Equality in Hong Kong's Public Sector: An Assessment of Post-Colonial Hong Kong*, 32 H.K. L.J. 103 (2002).

major conference in Hong Kong, at which representatives of women's groups had the opportunity to comment on the work it has done so far and to suggest future projects.

One disturbing sign is that the actual terms of reference of the Women's Commission do not even *mention* CEDAW.¹³⁶ There are also very few references to CEDAW on the Women's Commission's website. Based upon our conversations with certain members of the Women's Commission, it appears that the Commission has not yet given much express consideration to CEDAW or to the role that it will play in the CEDAW reporting process. This is surprising, given that it was established to be the national enforcement mechanism for CEDAW in Hong Kong. Hopefully, the Commission will start to consider CEDAW more actively in the next year, as the due date for Hong Kong's second periodic report draws closer. It will be interesting to see if the Women's Commission writes its own shadow report, one that actually critiques the government. If it fails to do so, it may lose enormous credibility with the local women's movement. In preparing its shadow report, the Women's Commission could conduct a consultation exercise similar to that of the WNC in the UK. The Women's Commission could also conduct training sessions on CEDAW, and improve the quality of the government's publicity materials on the treaty. The government is keenly aware of its obligation to publicise CEDAW, but thus far has done so largely by distributing fairly childish paraphernalia including CEDAW mouse pads, cartoons, coasters, and even board games. More than one NGO has complained to us that these items do not teach women anything about the content or the potential of CEDAW. Better information, particularly in Chinese, would enable a broader range of women's organisations to become involved in the CEDAW enforcement process.

In addition to creating the Women's Commission, the Hong Kong government has taken certain other limited steps to respond to the CEDAW Committee's Concluding Comments. For example, the CEDAW Committee called for more active implementation of the principle of "equal pay for work of equal value," required by Article 11(d) of CEDAW, and the government agreed to co-operate with a study by the Equal Opportunities Commission on the extent to which

136. The terms of reference can be found on the Women's Commission's website, available at <http://www.women.gov.hk/women/eng/about.htm> (last visited Feb. 24, 2003).

the principle is being followed in the public sector.¹³⁷ The government has provided extensive salary data and also allowed outside consultants to conduct job evaluation interviews. However, as of this writing, the results of the study had not been released.¹³⁸

The Hong Kong government also agreed to amend the statutory definition of rape. It had initially maintained that there was no need to amend the legislation because the Hong Kong courts would almost certainly follow the decision of the English House of Lords in *R v. R*,¹³⁹ which held that rape was possible within marriage despite the reference to “unlawful” sex in the statutory definition. In fact, the government was probably correct about this but the statute did arguably create uncertainty in this respect. In any event, after receiving the CEDAW Committee’s Concluding Comments, the government proposed legislative amendments to put the matter beyond doubt.¹⁴⁰

Perhaps the most important result of these policy developments is that they have shown women’s groups that the CEDAW reporting process can have some impact upon the government. The NGOs that banded together to write the shadow report will almost certainly continue to participate in future reviews of Hong Kong by the CEDAW Committee. Moreover, many representatives of women’s groups have expressed a desire for more information and training on CEDAW, so that they can make greater use of it in future campaigns. It has also been suggested that NGOs, the Equal Opportunities Commission, and the Women’s Commission should band together to conduct an annual review of government efforts to implement

137. See *CEDAW Report*, *supra* note 42, at ¶¶ 331-332.

138. There is no doubt that the Sex Discrimination Ordinance requires (in both the public and private sectors) equal pay for equal work, because Section 11 prohibits discrimination in the terms and conditions of employment. The question of whether it also requires equal pay for work of equal value has not yet been tested. For a discussion of this issue, see Carole J. Petersen, *Implementing Equal Pay for Work of Equal Value in Hong Kong: A Feminist Analysis*, in *Proceedings - Equal Pay for Work of Equal Value: A Conference Organised by the Equal Opportunities Commission* (2000), available at <http://www.eoc.org.hk/ME/conference/index.htm> (last visited Feb. 24, 2003).

139. *R. v. R*, 1 A.C. 599, 614 (1992).

140. For an analysis of this legislative effort (and some of the complications that arose with respect to the element of “unlawful” in certain other sexual offences), see Robyn Emerton, *Marital Rape and the Related Sexual Offences: A Review of the Proposed Amendments to Part XII of the Crimes Ordinance*, 31 H.K. L.J. 415 (2001). As of this writing, the government had decided to adopt a simpler approach, by leaving the element of “unlawful” in the definition of rape and various other offences but adding a provision to the effect that “for the avoidance of doubt,” sex without consent within marriage constitutes rape.

CEDAW in Hong Kong.¹⁴¹

E. Judicial Use of CEDAW in Hong Kong

The Hong Kong Sex Discrimination Ordinance does not contain a provision expressly stating that it must be interpreted to comply with the Convention. The government successfully opposed amendments proposed by Anna Wu and the Bills Committee that would have added such language. However, this does not prevent the courts from referring to CEDAW when interpreting domestic legislation, since it is a general rule of statutory construction that the legislature is presumed to intend to conform to public international law.¹⁴² Thus, if "one of the meanings which can be ascribed to the legislation is consonant with the treaty obligation and another or others are not, the meaning which is consonant is to be preferred."¹⁴³ Moreover, when the Hong Kong government announced that it would propose the Sex Discrimination Bill, it expressly informed the legislature that it was doing so in order to comply with CEDAW, which, by that time, the government had conceded would soon be extended to Hong Kong.¹⁴⁴ In its Initial Report to the CEDAW

141. In April 2002, Ms. Shanthi Daiyam, the Executive Director of the Kuala Lumpur-based International Women's Rights Action Watch Asia Pacific (known as IRAWAP), visited Hong Kong and participated in a conference organised by the Centre for Comparative and Public Law, University of Hong Kong. Representatives of the Women's Commission, the Equal Opportunities Commission, and several women's organisations participated. One of the conclusions of the conference report was that there should be an annual review of the extent to which CEDAW is being implemented in Hong Kong and broader training of NGO representatives on how to participate in the CEDAW process. See *Conference Report: Equality and Non-discrimination: The Two Essential Principles for the Promotion and Protection of the Human Rights of Women* (Centre for Comparative and Public Law and the Women's Studies Research Centre, University of Hong Kong) (Apr. 20, 2002) (on file with author).

142. See *R v. Sin Yau-ming*, 1 H.K. P.L.R. 88, 105 (1991). See also *Garland v. British Rail Engineering Ltd* (No 2), 2 A.C. 751, ¶ 90 (H.L. 1983); Francis A. R. Bennion, *STATUTORY INTERPRETATION: A CODE* § 270, at 630-635 (3d ed. 1997).

143. *Salomon v. Commissioners of Customs and Excise*, 2 Q.B. 116, 143 (1967) (Diplock L.J.).

144. In 1994, the government informed the Legislative Council that "we will need to introduce some form of legislation prohibiting discrimination, which would include equal pay legislation, before CEDAW is formally extended to Hong Kong." See *Home Affairs Branch, Legislative Council Brief: Equal Opportunities for Women and Men*, ¶ 10 (June 1994), reprinted as Doc. No. 27, at 336, in *HONG KONG EQUAL OPPORTUNITY LAW—LEGISLATIVE HISTORY ARCHIVE 1993-1997* (Centre for Comparative and Public Law, University of Hong Kong 1999). Similarly, a government press release of June 3, 1994 stated that the "institution of sex discrimination legislation is a means to implement the provisions of CEDAW." *Id.* Doc. No. 26, at 333-335.

Committee, the government has also cited the Sex Discrimination Ordinance as its principle means of implementing the treaty Hong Kong.

Interestingly, the first judicial reliance upon CEDAW arose in a case against the government. The controversy started in 1998, when the Equal Opportunities Commission launched its first formal investigation into the Education Department's system of allocating students to secondary schools. Hong Kong's system of secondary schools is extremely hierarchical, with "band 1" schools ranking the highest and "band 5" schools ranking the lowest.¹⁴⁵ Students are assessed at the completion of primary school, and are "banded" at the tender age of eleven. Students and their parents work very hard to prepare for these assessments, as the band to which a student is assigned is extremely important to her future opportunities. A student who is placed in band 1 will be admitted to a highly ranked secondary school, and is almost certain to go on to university and a bright future.

Until recently, it was widely believed that the students were allocated to each band entirely on the basis of merit. However, male and female students were able to compare their scores and relative bandings in 1998, when they obtained access to the results of the banding exercises for the first time. The Equal Opportunities Commission began receiving complaints from female students who alleged that they had been rejected from elite secondary schools while boys with lower scores had been admitted. The Equal Opportunities Commission thus conducted its first formal investigation, and determined that the system violated the Sex Discrimination Ordinance. In general, female students completing primary school performed better than male students on the relevant assessments. However, the Education Department had for years been secretly scaling the results on the basis of gender. It was also banding male and female students separately and was applying gender quotas to the elite schools. The purpose of these three mechanisms was to ensure that girls did not obtain a majority of the places in the higher-ranked secondary schools, which the government admitted they would have otherwise obtained.¹⁴⁶ Although individual boys suffered from the

145. At the time of the litigation, there were five bands. However, since that time the government has reduced the number of bands to three.

146. See EQUAL OPPORTUNITIES COMMISSION, EXECUTIVE SUMMARY: FORMAL INVESTIGATION INTO THE SECONDARY SCHOOL PLACES ALLOCATION SYSTEM, ch. 4, ¶¶ 24, 29 (1999), available at <http://www.eoc.org.hk/ME/investigation/index.htm> (last vis-

process in some school nets, more girls were adversely affected because they were required to achieve better scores than boys to be placed in a particular band in most school nets.

When the Equal Opportunities Commission released the report on its formal investigation in August 1999, it created enormous controversy. At first, the government assured legislators that it would reform the allocation system.¹⁴⁷ However, in early 2000, the government announced that it had obtained new legal advice and would seek to justify the system. The Equal Opportunities Commission eventually applied for judicial review, and in May 2001, the court issued a declaration that all three elements of the government's allocation system were unlawful.¹⁴⁸ The Equal Opportunities Commission relied extensively upon CEDAW and other international jurisprudence in its submissions and the court took the opportunity to hold that the Sex Discrimination Ordinance should be interpreted, where reasonably capable of bearing such a meaning, so as to carry out Hong Kong's obligations under CEDAW.¹⁴⁹

The court's reliance upon CEDAW had a significant impact upon the government's defences. The government's first alternative defence was that boys develop later than girls and that the gender-based mechanisms applied by the government only took away the "artificial" and temporary advantage that girls enjoy. The Equal Opportunities Commission submitted expert evidence to refute the theory that Hong Kong boys are "late bloomers" that catch up with girls in secondary school.¹⁵⁰ However, the court held that the government's theory would not, in any event, make gender-based scaling any less discriminatory because generalised assumptions about male and female development cannot justify less favourable treatment of particular girls. In so holding, the court relied in part

ited Feb. 24, 2003).

147. See Secretary for Education and Manpower, Address at the Hong Kong Hansard (Nov. 11, 1999) (responding to a motion by legislator Christine Loh and the speech of legislator Yeung Yiu-chung). English translation available at <http://www.yeungyiuchung.org.hk/edebate/ye036.htm> (last visited Feb. 24, 2003).

148. *Equal Opportunities Commission v. Director of Education*, 2 H.K. L.R.D. 690 (2001), available at <http://www.eoc.org.hk/ME/case/index.htm> (last visited Feb. 24, 2003).

149. *Id.* ¶¶ 90, 109.

150. For example, the Equal Opportunities Commission's expert witness performed an analysis of public examination results that showed that Hong Kong girls continue to out-perform boys throughout secondary school. See *id.* ¶ 132.

upon Article 10 of CEDAW, which provides that State Parties have an obligation to eliminate stereotyped concepts of men and women.

The court also relied upon CEDAW when considering the Education Department's main defence, which was that the gender-based mechanisms fell within the exemption for special measures (voluntary affirmative action) provided in Section 48 of the Sex Discrimination Ordinance. The court could have rejected the government's defence on the ground that CEDAW does not permit special measures for boys, but rather only for girls or women.¹⁵¹ However, the court relied upon another factor, which is that the government's system appeared to establish permanent special treatment for boys. Since affirmative action is normally only considered justifiable when it is used to overcome the effects of past discrimination, the intention should be to return to equal treatment once an "equal playing field" has been established.

Although the words "temporary" do not appear in Section 48 itself, the court held that this meaning may be inferred by reference to CEDAW. Article 4 of CEDAW provides that special measures "shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." The court held that the government's system offended this principle because the Director of Education had been using gender-based mechanisms to assist boys for almost twenty years and intended to maintain them for the indefinite future.

However, the court also held that even if no reference to CEDAW had been made, the section 48 defense would fail because the government had not shown that the departure from equal treatment was a rational and proportionate response to the perceived problem of boys' poorer performance.¹⁵² It also noted that it was a matter of "considerable disquiet" that none of three gender-based mechanisms in the Secondary Schools Placement Allocation system

151. See Andrew Byrnes, *Affirmative Action, Hong Kong Law, and the SSPA, presented at Equal Opportunities in Education: Boys and Girls in the 21st Century* (conference organised by the Hong Kong Equal Opportunities Commission) (Nov. 8, 1999), available at <http://www.eoc.org.hk/ME/conference/index.htm> (last visited Feb. 24, 2003).

152. See *Equal Opportunities Commission v. Director of Education*, *supra* note 148, ¶ 116. In particular, the government failed to prove that boys caught up with girls academically later in life. The system was also found to be irrational in that it primarily assisted the boys in the top thirty percent of the class and could actually penalise the other boys.

were actually intended to assist boys to *overcome* whatever caused them to perform at a lower standard than girls. Rather, the government had simply developed allocation mechanisms to "manufacture an advantage in favour of one gender at the intended expense of the other."¹⁵³

The court's decision was an important victory for the Equal Opportunities Commission. However, it was equally important for having set the more general precedent that the Sex Discrimination Ordinance should be interpreted, where possible, so as to carry out Hong Kong's obligations under CEDAW. Providing that the courts of Hong Kong maintain their independence from the government (which we would argue they have done so far, despite the fact that Hong Kong is now a part of the People's Republic of China¹⁵⁴), we would expect the courts to continue to rely upon CEDAW when interpreting the Sex Discrimination Ordinance. One advantage of the fact that the Hong Kong Bill of Rights Ordinance 1991 was largely copied from the ICCPR is that Hong Kong courts are now very accustomed to submissions based upon international human rights law. In *R v. Sin Yau Ming*,¹⁵⁵ an early case applying the Bill of Rights Ordinance, the Hong Kong Court of Appeal held that when interpreting the Bill of Rights, Hong Kong courts may derive assistance from the decisions of courts in other countries with entrenched bills of rights, as well as the decisions of the European Court of Human Rights and European Human Rights Commission, and the decisions and comments of the United Nations Human Rights Committee. While none of these sources are binding, the Court of Appeal held that they should be given "considerable weight." Some scholars have complained that there has been a decline since *Sin Yau Ming* in Hong Kong courts' willingness to embrace international jurisprudence. However, there is no doubt that the introduction of the Bill of Rights did make Hong Kong lawyers and judges much more aware of the body of international

153. *See id.* ¶ 136.

154. There have been concerns about the independence of the Hong Kong judiciary, particularly after the constitutional crisis surrounding the "right of abode" cases, in which the Standing Committee of China's National People's Congress exercised its power under Article 158 of the Basic Law (at the request of the Hong Kong government) to override an interpretation of the Basic Law given by the Hong Kong Court of Final Appeal. A good deal has been written about this controversy. For a collection of documents and essays on both sides of the debate, see M.M. CHAN ET AL., HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION (2000).

155. *R. v. Sin Yau Ming*, 1 H.K. P.L.R. 88, 107 (1991).

law regarding human rights.¹⁵⁶ This may be one reason that the Hong Kong judiciary has been quicker than the UK judiciary to rely upon CEDAW when interpreting domestic legislation.

V. Conclusions

In our overview of the *First CEDAW Impact Study*,¹⁵⁷ we reflect on the factors that contribute to the effectiveness of the CEDAW in different jurisdictions. We list eight factors, many of which relate to NGOs. For example, we stress the importance of NGO participation in the reporting process; constructive dialogue between all parties and NGOs; the ability of NGOs to use the Concluding Comments as a lobbying tool; and a general recognition by NGOs of the strategic use of international conventions.

Our study of Hong Kong and the UK confirms the importance of NGOs in the CEDAW enforcement process. Although Hong Kong has enjoyed CEDAW for a much shorter period of time, CEDAW has arguably already had more direct impact in Hong Kong than in the UK.¹⁵⁸ In our view, this is largely because Hong Kong women's organisations were galvanised by the enormous campaign to persuade the government to accept CEDAW and are now more enthusiastic about learning to use it. In contrast, UK NGOs have not shown the same awareness of CEDAW, and have not used the reporting process as effectively to hold the government to account.

The growing interest in human rights in the last decade is one factor that Hong Kong and the UK both share, although for different reasons. Hong Kong's interest in human rights can be traced to anxieties surrounding the "handover" to China in 1997 and the

156. Byrnes has concluded that although the outcomes in many cases do not reflect a true understanding, the courts in Hong Kong have at least shown that they are "open to a consideration of a wide range of international source material and comparative case law that barely figured at all in the pre-1991 case law" of Hong Kong. See Andrew Byrnes, *Jumpstarting the Hong Kong Bill of Rights in its Second Decade? The Relevance of International and Comparative Jurisprudence*, presented at A Decade of the Bill of Rights and the ICCPR in Hong Kong: Review and Prospects (Centre for Comparative and Public Law, University of Hong Kong) (Jan. 12, 2002), available at <http://hku.hk/ccpl/pub/conf/index.html> (last visited Feb. 24, 2003).

157. *First CEDAW Impact Study*, *supra* note 57, at 18.

158. This is particularly interesting because the International Convention on the Elimination of All Forms of Race Discrimination (which was extended to Hong Kong in 1969, when it was ratified by the British government) has made almost no practical difference, demonstrated by the fact that Hong Kong still has no race discrimination legislation that applies to the private sector.

resulting enactment of the Bill of Rights Ordinance 1991. The greater interest within the UK has been brought about by the enactment of the Human Rights Act 1998. In both societies, these events have created opportunities for women's organisations to make greater use of international instruments to promote their own agendas. However, while many Hong Kong women's organisations looked to CEDAW to provide the international standards necessary to improve women's rights in the territory, women in the UK have tended to rely more upon the domestic political process. When they do look outside the borders, UK women's groups have tended to rely more upon the law of the European Union and especially the European Convention on Human Rights. While this approach is appropriate in many instances, it is important to keep in mind the full range of international documents available. As the CEDAW Committee observed, the European Convention is primarily concerned with civil and political rights, and it does not address many of the social and economic rights dealt with by CEDAW. A policy of elevating the European Convention, while paying little attention to CEDAW, could arguably marginalise social and economic rights to the detriment of women.¹⁵⁹

The promotion of CEDAW as a Bill of Rights for Women can help to put economic and social rights more on a par with civil and political rights. The Concluding Comments and General Recommendations of the CEDAW Committee can be fed into policy debates. Eventually, judges, lawyers, and activists may also refer to the CEDAW Committee's opinions on cases or inquiries under the Optional Protocol. For example, Article 4 might be used in campaigns to allow temporary special measures to encourage greater female representation in the legislature. Similarly, Article 11 has given the Hong Kong Equal Opportunities Commission support for its current study of the extent to which "equal pay for work of equal value" is being achieved in the Hong Kong public sector.

Of course, it is arguable that UK women simply have less need than Hong Kong women for the standards that CEDAW has established. UK women enjoy a fully democratic system and have had a domestic sex discrimination law since 1975. In contrast, Hong Kong women used the campaign for CEDAW as an added reason to enact the Sex Discrimination Ordinance, and have come to rely upon international human rights bodies to provide a persuasive "critique"

159. MCCOLGAN, *supra* note 75.

of the unelected Hong Kong government.

However, we would argue that participation in the CEDAW enforcement process has value beyond the particular policy and legal changes that it may help to bring about. One of the great values of CEDAW is that it encourages women's movements to think in terms of a global citizenship. By using international structures and international standards to critique its own government, a women's movement can help to advance the concept of universal human rights. Using CEDAW as a lobbying tool or as part of a submission in litigation strengthens the concept that human rights are not just abstract ideas, but are concrete rights that can be applied within all societies. It also encourages individuals and organisations to exchange ideas with those in other societies. Ruth Lister maintains that "the framework of global citizenship helps to focus on the responsibilities of the more affluent nation-states towards those in the 'developing world' that lack the resources to translate human rights, as defined in the UN Covenant, into effective citizenship rights."¹⁶⁰ In our study, one of the interviewees from an environmental network talked about the difficulties of making international ideas relevant to local environmental groups. She argued that it was necessary to avoid United Nations jargon and to find practical and meaningful messages. She gave an example of a campaign against pesticides that emphasised not only the harm done to women in Britain eating the product, but also the harm to those women spraying the pesticide in the third world. The slogan was "it hurts you over here and them over there." Finding these links is one way to persuade people to take notice of what is happening in the international community. If CEDAW were used more widely through the legal and political systems of all countries, it would add to the weight of the document as an international Bill of Rights for women.

An increase in the use of CEDAW within the domestic sphere is also consistent with the UK government's foreign policy and with Hong Kong's approach to its external affairs and international image. Since 1997, the UK's Labour government has regarded human rights as an integral part of that policy and has stated that the "human rights of women are a special priority." The UK government also acknowledges that its "credibility as an advocate of human rights in the world is directly affected by our own record at home."¹⁶¹ The

160. RUTH LISTER, *CITIZENSHIP: FEMINIST PERSPECTIVES* 60 (1997).

161. See FOREIGN & COMMONWEALTH OFFICE AND DEPARTMENT FOR

government is committed to promoting CEDAW in its bilateral relations, as part of its human rights policy, and arguably it should set an example by encouraging the use of CEDAW within the UK. By applying the General Recommendations of the Committee and using the Concluding Comments, the UK government could show that it had serious regard for the principles set forth in CEDAW. Similarly, although the Hong Kong Special Administrative Region does not have responsibility for foreign affairs under the terms of the Basic Law, the Hong Kong government does like to present itself as acting consistently with international human rights norms (thereby maintaining a very different human rights record from mainland China). Using CEDAW within the domestic sphere is entirely consistent with these objectives.

CEDAW has the potential to make a difference in the law, politics, and culture of a society. The study of Hong Kong and the UK show that political will and the significance attached to United Nations conventions are critical, as well as the use made of CEDAW by NGOs. The creative and innovative use of CEDAW depends on the will of the women's movement in the societies studied to persuade governments that they should strive to meet the standards adopted in this international bill of rights for women.